REPORT ON UNITED STATES

BARRIERS TO TRADE AND INVESTMENT

2000

EUROPEAN COMMISSION

Brussels, July 2000

Foreword

The 2000 Report on United States Barriers to Trade and Investment is the sixteenth such annual report. It has been compiled by the Unit for Relations with the United States of America of the Directorate General for External Relations in cooperation with the Market Access Unit of the Directorate General for Trade and the Delegation of the European Commission in Washington, D.C., on the basis of material available to the services of the European Commission. Its aim is to provide an inventory of obstacles that EU exporters and investors encounter in the US.

This Report needs to be placed in the context of a transatlantic economic relationship which has grown particularly strongly over the years, to the benefit of both economies, and which is underpinned by the most extensive trade and investment links in the world.

EU-US relations are currently conducted within the framework of the New Transatlantic Agenda (NTA) and accompanying EU-US Joint Action Plan adopted at the EU-US Summit of December 1995. Efforts under the NTA to intensify and extend multilateral and bilateral co-operation in the field of trade and investment led to the adoption, at the EU/US Summit in London in May 1998, of a joint statement on the Transatlantic Economic Partnership (TEP) and the subsequent TEP Action Plan, endorsed at the December 1998 EU/US Summit in Washington. Under the Action Plan, we are giving particular priority this year to specific initiatives in the fields of technical barriers to trade and regulatory cooperation, extended Mutual Recognition Agreements in the goods sector, to expand MRAs to certain services sectors and to specific joint projects on biotechnology.

Furthermore, the EU-US Summit in Bonn on 21 June 1999 approved a set of "early warning" principles, that aim at identifying and preventing potential bilateral problems at an early stage, in order to prevent conflicts and facilitate problem resolution before they risk undermining the much broader EU-US relationship. We are now in the process of finding ways to making these principles function in practice.

This Report must therefore be seen against the background of the joint commitment of the EU and the US, in the NTA and in the TEP, to strengthen and consolidate the multilateral trading system, and to progressively reduce or eliminate barriers that hinder the flow of goods, services and capital between the EU and the US.

The fact remains that a considerable number of impediments, ranging from more traditional tariff and non-tariff barriers, to differences in the legal and regulatory systems, or due to the absence or limitation of internationally agreed rules and disciplines, still need to be tackled. The Commission remains firmly committed to addressing these through the appropriate channels (bilateral, plurilateral and multilateral) particularly as the reinforcement of efforts to resolve bilateral trade issues and disputes is essential to the confidence-building process which is an integral part of the NTA.

Moreover, a number of worrying new impediments to EU exports to, and investments in, the US have arisen since the last annual report. One recent and very alarming example is the “carousel” legislation signed into law on 18 May this year. Other important obstacles that have to be stressed are restrictions on access to the US satellite communications market. Furthermore, the implementation of the Understanding reached at the EU-US Summit in May 1998 with a view to resolving differences over US extraterritorial sanctions legislation remains stalled in the absence of US Congressional legislation to amend Title IV in the Helms-Burton Act.

The report should also be seen in the context of the broader policy initiative to improve access to foreign markets for European exports. As part of this, the Commission has set up an extensive electronic Market Access Database available to the public on the Internet (http://mkaccdb.eu.int) (additional material on EU-US relations, as well as the Trade Barriers Report itself is available at http://europa.eu.int/comm/external_relations/us/intro/index.htm). The Database provides market access information in the broadest sense, including economic and regulatory information, tariff levels as well as analyses of trade issues. For readers, this facilitates access throughout the year to on-line updates of the material contained in the published report as well as to the additional background information that is included in the database.

It is to be hoped that, as a means of identifying problems of access to and of operating in US markets, the Commission services' Report will continue to play a useful role in focusing dialogue and negotiations -- both multilateral and bilateral -- on the elimination of obstacles to the free flow of trade and investment. The Report has taken into account developments until the beginning of July 2000. Any comments should be addressed to the Unit for Relations with the United States of America, Directorate General for External Relations, European Commission, 200 rue de la Loi, 1049 Brussels (fax: +32.2.299.02.08).

Summary

Extraterritoriality

The EU strongly opposes the extraterritorial provisions of certain US legislation, which hamper international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US. Of particular concern at the present time are the Helms-Burton Act and the Iran Libya Sanctions Act. Important headway towards a lasting solution to this dispute was made at the 18 May 1998 EU/US Summit in London. However, implementation of the Understanding reached at that occasion continues to depend on US Congress legislative action.

Unilateralism

Unilateralism in US trade legislation also remains a matter of concern. Whilst the US has in practice made extensive use of the WTO dispute settlement system, it retains the opportunity to take unilateral trade measures. Recently the EU has won two dispute settlement cases before the WTO, one against the suspension of customs liquidation in the banana dispute, and one against Sections 301 to 310 of the US 1974 Trade Act. The EU has also initiated dispute settlement proceedings against the "carousel" legislation signed into law on 18 May 2000 (section 407 of the Trade and Development Act of 2000).

Tariff barriers

Tariffs have been substantially reduced in successive GATT rounds. As a result, the EU's concern is now focused on a relatively limited number of US "peaks" and other significant tariffs where less progress has been made.

Other customs barriers

EU exports also face a number of additional customs impediments, such as the customs user fees and the excessive invoicing requirements on importers, which add to costs in a similar way to tariffs. The US also changed in 1996 its origin rules giving rise to specific problems for various EU textile and clothing products that are no longer able to claim their national origin, but this problem is almost resolved as a result of the imminent adoption of new rules of origin. The EU is also very concerned about the discriminatory nature of the US Harbour Maintenance Tax, levied on waterborne imports in all US ports. In March 1998 the EU requested WTO dispute settlement consultations and is not satisfied with alternative legislation introduced in the US Congress.

Trade defense instruments

A WTO panel established in January 1999 after an investigation under the Trade Barrier Regulation has ruled that the 1916 US Antidumping Act is in contradiction with the WTO Anti-dumping Agreement and GATT 1994. The WTO Appellate Body has also condemned on 10 May 2000 the countervailing duties maintained after the arm's length privatisation of the British Steel company, thereby rejecting the methodology followed by the US Department of Commerce. The EU has also been active against the abusive recourse by the US to the safeguard instrument, in particular in the wheat gluten case. Regulations restricting exports, perceived as hindering trade for third parties, are also a matter of concern.

Technical barriers to trade

EU exporters continue to face a number of behind-the-border impediments. The proliferation of regulation at State level presents particular problems for companies without offices in the US. In addition, some federal standards differ from international norms meaning that manufacturers cannot directly export to the US products made to EU standards (normally based on international standards). Other related difficulties concern labelling requirements and excessive reliance on third-party certification. The FDA drug approval procedures continue to give non-US based firms difficulties. In the agricultural area, a number of sanitary and phytosanitary issues remain a significant source of difficulty for the EU, although some of these may be solved by the Veterinary Equivalence Agreement, signed on 20 July 1999.

Government procurement

Even before the Uruguay Round was ratified, the EU and US had concluded negotiations on a further bilateral procurement agreement that improves on the provisions of the WTO Government Procurement Agreement. These two agreements increased substantially the bidding opportunities for the two sides. However, the EU remains concerned about the wide variety of Buy America provisions that persist, and to which are being added others for federally funded infrastructure programmes. Small business set-aside schemes also limit bidding opportunities for EU contractors in a substantial manner. The EU also opposes sub-federal selective purchasing legislation, restricting the ability of EU and other companies doing business with specific countries to bid for contracts in various States and cities. Apart from other actions, the EU considers that an increase in the coverage of the US GPA offer (and in particular the elimination of the existing exceptions) would contribute to an improvement of this situation.

Aeronautics industry

Despite the existence of the 1992 EC-US Large Civil Aircraft agreement the EU remains concerned about the level of indirect support to US aircraft manufacturers. This is also an area for multilateral action, and progress needs to be made on the Civil Aircraft Agreement that remains stalled in the WTO.

Shipbuilding

The 1994 OECD Shipbuilding Agreement which aims at regulating unfair practices, measures of support and injurious pricing still cannot enter into force due to the absence of the US ratification of the Agreement. The maintenance of a number of US subsidies, protective legislation and tax policies, remain a matter of concern.

National security restrictions

Although the principle of national security has a long tradition in trade policy, the EU has repeatedly expressed concern about its excessive use by the US as a disguised form of protectionism, particularly in relation to the application of import, procurement and investment restrictions, as well as the extraterritorial application of export restrictions. In particular, the 1988 Exon-Florio amendment and following legislation to restrain foreign investment in, or ownership of, businesses relating to national security has proved to be problematic. However, the absence of a clear definition of “national security” has led to an overly wide interpretation of the term.

Conditional national treatment

Furthermore, the provision of conditional national treatment in various US laws, and notably in the area of science and technology research remains troublesome.

Tax measures

Concerns about federal tax measures focus on the nature of reporting requirements and the specific manner for calculating what is due. The EU deems State “world-wide” unitary taxes as inconsistent with US obligations under its tax treaties with third countries. Foreign Sales Corporations (FSC) legislation remains a matter of major concern, and the WTO Appellate Body recently affirmed in a report of 24 February 2000 that the FSC is incompatible with the WTO Subsidies Agreement and the Agreement on Agriculture. The EU is closely monitoring the evolution of this case and in particular how the US will implement the WTO ruling by 1 October 2000.

Intellectual property

Despite a number of positive changes in US legislation following Uruguay Round commitments, problems remain due to discrepancies between US legislation and other international commitments. In addition, the issue of informing right-holders of government use of patents as well as various others related to appellations of origin, geographical indications, copyright, trademarks and patent protection have not been resolved. The Community and its Member States recently won a WTO Dispute Settlement case regarding obstacles to the licensing of music works in the US (section 110(5) of the US Copyright Act), but it remains to be seen how the US will implement the panel's recommendations. The protection of trademarks in the US, notably those stemming from Cuban origin, also raises concerns in respect of the compatibility with the TRIPs Agreement. Moreover, the co-existence of fundamentally different patent systems (US first-to-invent system versus first-to-file system followed in the rest of the world) continues to create considerable interface problems for EU companies.

Communication services

The GATS Basic Telecommunications Agreement concluded in 1997 and in force since February 1998 has led to significant commitments on market access. Nonetheless, the EU remains concerned about the considerable barriers and hurdles that European and foreign-owned firms wishing to get access to the US market are still facing (e.g. investment restrictions, lengthy proceedings, conditionality of market access, and reciprocity-based procedures). An important obstacle is represented by the current restrictions on access to the satellite communications market in the US, though problems also exist in a number of other areas. This situation is not in line with the open market access policy advocated by the US and provides a competitive advantage to the significant number of US companies which have already access to the European market in this field.

Air transport services

A number of issues continue to create problems including foreign ownership restrictions and air security regulations.

Professional services

The implementation of the GATS schedules for professional services has resulted in some improvement in market access. However, a number of problems, especially due to regulation at the State level, remain to be tackled in order to secure more transparent and open access to the US market.

Maritime services

The EU was disappointed that the extended WTO GATS negotiations on maritime transport, during which the US never tabled an offer, could not be brought to a successful conclusion. In the US foreign-built vessels are prohibited from engaging in (direct or indirect) coastwise trade (Jones Act), and cannot be documented and registered for dredging, towing or salvaging. In addition, there has been no progress on the elimination of requirements that cargoes generated by US Federal programmes are shipped on US-flagged ships.

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1. INTRODUCTION

1.1 Transatlantic Co-operation

The New Transatlantic Agenda

The New Transatlantic Agenda (NTA) and the accompanying Joint EU-US Action Plan, adopted at the EU-US Summit in Madrid on 3 December 1995, provide an innovative and flexible political basis for transatlantic relations by moving the relationship from one of consultation to one of joint action. The NTA contains a range of commitments in areas such as foreign and security policy, international crime, drug trafficking, migration, environment and health, as well as with regard to increasing transatlantic contacts at the level of the citizen ("Building bridges across the Atlantic"). There is also a substantial chapter on economic and trade issues ("Contributing to the expansion of world trade and closer economic relations").

Bonn Declaration

In the Bonn Declaration adopted at the 21 June 1999 EU-US Summit in Bonn, both sides committed themselves to a "full and equal partnership" in economic, political and security affairs. This explicit recognition is a step forward from the NTA document. The Bonn Declaration outlines how the EU and the US want to shape their relationship over the next decade and is embedded in the NTA process.

NTA achievements

Significant progress has been made since 1995, with the signature at the EU-US Summit of May 1997 in the Hague of the Agreement on Customs Cooperation and Mutual Assistance in Customs Matters; the entering into force on 1 December 1998 of the Mutual Recognition Agreement covering specific goods areas (telecom equipment, pharmaceuticals, medical devices, electromagnetic compatibility, electric safety and recreational craft); the EU-US Veterinary Equivalence Agreement aimed at facilitating trade in live animals and animal products and signed on 20 July 1999; the signature on 4 June 1998 of the EU-US Agreement on the application of positive comity principles in the enforcement of their competition laws; the Science and Technology Agreement signed on 5 December 1997, which extends and strengthens the conduct of co-operative activities between EU scientific institutions and a range of US government research agencies. At the EU-US Summit in Lisbon 31 May 2000, the Consultative Forum on Biotechnology was launched. This independent forum will contribute toward fostering better understanding of the many important issues involved in biotechnology. At the Lisbon Summit, Leaders also could register considerable progress on the so called "Safe Harbour Principles" for the adequate protection of personal data transfers.

The economic relationship between the EU and the US is of vital importance to both. The EU and the US are each other's single largest trading partner. The EU and US have by far the world's most important bilateral investment relationship, and they are each other's most important source and destination for foreign direct investment (see Chapter 1.2 for detailed figures).

Despite this healthy economic relationship, transatlantic trade and investment remain hampered by a significant number of impediments, mainly of a non-tariff kind. The NTA gave renewed impetus to address some of these issues. In particular, the NTA commits the EU and the US, without detracting from the existing co-operation in multilateral fora, to progressively reduce or eliminate barriers that hinder the transatlantic flow of goods, services and capital.

The Transatlantic Economic Partnership

This commitment under the NTA led to the adoption of a joint statement on the Transatlantic Economic Partnership (TEP) at the May 1998 London Summit. The TEP includes both multilateral and bilateral elements. The core bilateral element of TEP is to tackle those trade issues - mainly regulatory barriers - which are now the main obstacle to transatlantic business, while preserving a high level of protection for health, safety, consumers and the environment. At the same time, TEP is designed to stimulate further multilateral liberalisation, by establishing closer EU-US co-operation on the preparations for new multilateral negotiations in the WTO. An innovative aspect of TEP is the joint determination to integrate labour, business, environmental and consumer issues into the process.

At the beginning of November 1998, an Action Plan, with target dates, was agreed with the US Administration. The implementation of the Plan has so far yielded some useful results. However, it must be said that we have not come as far as we had expected when we set out the plan and implementation has been slower and more cumbersome than we thought. We are now giving new impetus to the process and have set out concrete goals to be achieved by the next Summit. These are common guidelines for regulatory cooperation, extended MRAs in the goods sector, expanding to MRAs to certain service sectors and to accomplish certain joint projects on biotechnology.

Early warning and problem prevention

The large number of high-profile EU-US trade disputes that have erupted in recent years has produced a widespread public perception that EU-US relations are mainly characterised by trade disputes. This is not the case. Such disputes touch only a minimal percentage (less than 2%) of an otherwise very healthy two-way trade flow. However, more differences are bound to arise between the EU and the US due to increasing interdependence between the world’s two major markets and often diverging domestic rules. These rules are frequently based on very different societal values and sensitivities as regards health, consumer and environmental protection. There are, nevertheless, legitimate expectations both among EU and US citizens and economic operators that the two sides should strengthen their capacity to properly manage differences.

The Bonn EU-US Summit on 21 June 1999 agreed on a set of principles, using the existing mechanisms established under the NTA and the TEP, for rendering early warning more effective in future. It is the common aim to identify and prevent problems at an early stage, in order to prevent conflicts and facilitate their resolution before they risk undermining the much broader

EU-US relationship. This does not guarantee the resolution of problems, but should constitute a serious effort to take each side's interests into account when taking policy, legislative or regulatory decisions. We are now in the process of making these principles functioning in practice and there certainly still remains some fine-tuning to be done.

1.2 The Economic Relationship

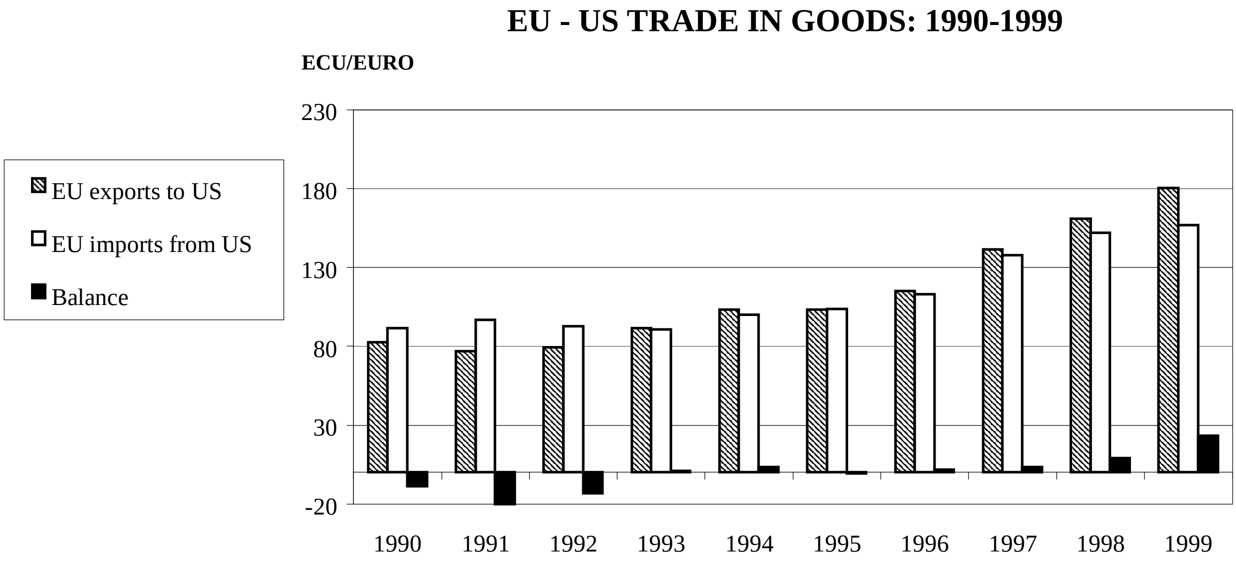
Transatlantic economic relations are underpinned by the most important trade and investment links in the world. Such links have grown particularly strongly over the last few years, to the benefit of both economies. Taking goods and services together, the EU and the US are each other's largest single trading partner, with a two-way flow of more than 490 billion EURO in 1999. Similarly, the two sides remain each other's most important source and destination for foreign direct investment with a combined stock of over 742 billion ECU in 1998. This section briefly reviews the data on EU-US trade and investment and places it in a global context (all EU data include the three new Member States unless otherwise indicated).

Trade in goods

Trade in goods (exports plus imports) between the 15 Member States of the EU and the US reached 337 billion EURO in 1999, with an increase of 12% for exports and 3,4% for imports over the previous year. After the EU registered a substantial trade deficit with the US for three consecutive years from 1990 to 1992, between 1993 and 1997 bilateral trade was almost in equilibrium. The EU recorded a surplus of 0.8 billion ECU in 1993 and 3.6 billion ECU in 1994, a small deficit of 0.4 billion ECU in 1995 and again a small surplus of 1.6 and 3.5 billion ECU in 1996 and 1997 respectively. EU trade data for 1998 and 1999 show a wider EU surplus of about 9.6 and 23,4 billion ECU respectively.

The US is the EU's single largest trading partner, accounting for 20.3% in total EU-imports and 23.8% in total EU-exports in 1999. Likewise, the EU is the main US partner for imports and the second largest market for US exports (after Canada), accounting for 22% of US exports and 19.3% of US imports in 1998.

The EU and the US are the world's most important traders. The EU's share in total world trade (excluding intra-EU trade) amounted to 18.5% in 1998 (19.2% for exports and 17.7% for imports); with the share of the US also amounting to 18.5% (15.9% for exports and 20.7% for imports). Taking only bilateral EU-US trade, it represents more than 7.1% of total world trade. This is equal to the share of US-Canada bilateral trade. Trade between the US and Japan represented 4.2% of total world trade in 1998.



Source: Eurostat, Comext database.

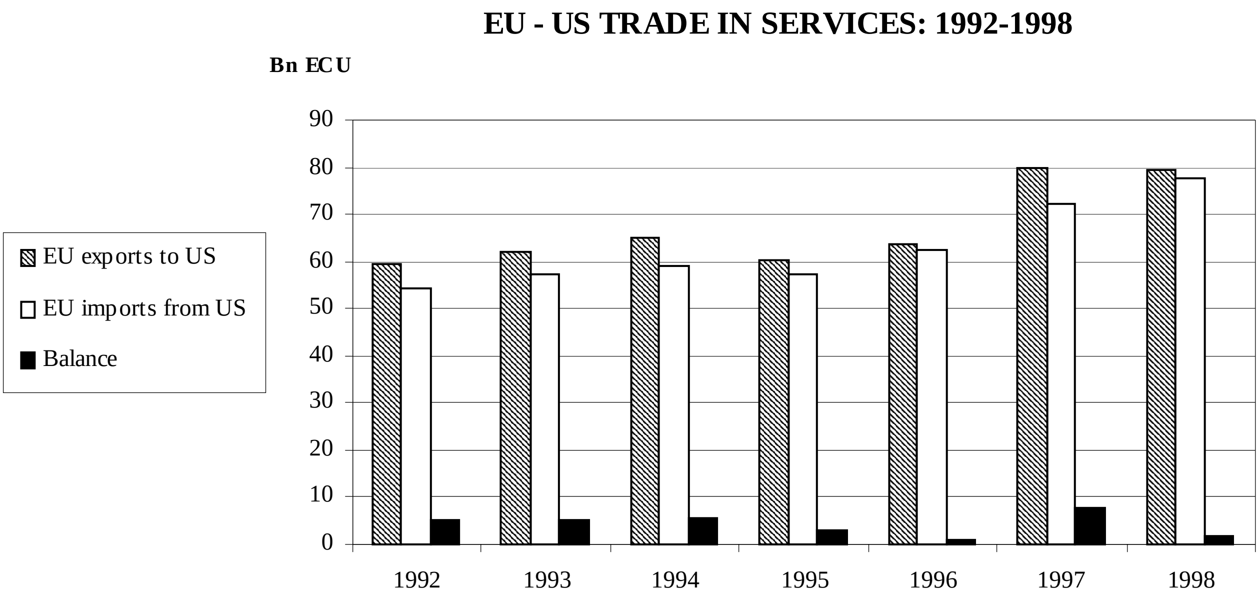
Transatlantic trade is increasingly characterised by high intra-industry trade intensities, especially for manufactured goods, and high levels of intra-firm trade. WTO estimates show that US-EU intra-industry trade intensities grew from a value of 39% in 1980, to 57% in 1995, an indication of an increasing specialisation within product categories to capture economies of scale. Intra-firm trade accounted for more than 45% of US merchandise imports from the EU and 37% of EU imports from the US in 1993, demonstrating the important "pull" effect on trade from foreign direct investment by US and EU affiliates in each other's markets.

Transatlantic trade is also heavily concentrated in sophisticated high technology products and, increasingly, in services. It is estimated that trade in high-technology products accounts for 20% of total EU/US merchandise trade. For both partners, transatlantic trade accounts for a large share of their total trade in high tech goods (34% for the EU and 25% for the US).

Trade in services

Trade in services between the EU and the US is rapidly gaining importance. In 1998 EU-US total turnover in services reached 157 billion ECU (79.4 billion ECU for EU's exports and 77.7 billion ECU for its imports), with a decrease of 1.7% for exports and increase of 6.7% for imports over the previous year. The EU recorded a small trade surplus of 1.7 billion ECU vis-à-vis the US in 1998, against a bigger surplus of 8 billion ECU in 1997.

EU(12)-US bilateral trade in services grew more rapidly than bilateral merchandise trade in the period 1985-1992, with the relative ratio increasing from 54% to 65%. The trend has since reverted, and in 1998 EU-US services trade amounted to 49.6 % of total turnover in bilateral merchandise trade.



Source: Eurostat, NewCronos Database.

Notwithstanding the latter developments, in 1998, while the EU accounted for 20% of US merchandise trade, more than 33% of US trade in services was with the EU. Similarly, in 1998 the US accounted for 21.6% of extra-EU trade in goods, but for 34.4% of extra-EU trade in services. These trends compare with much lower values for trade in services with other major trade partners.

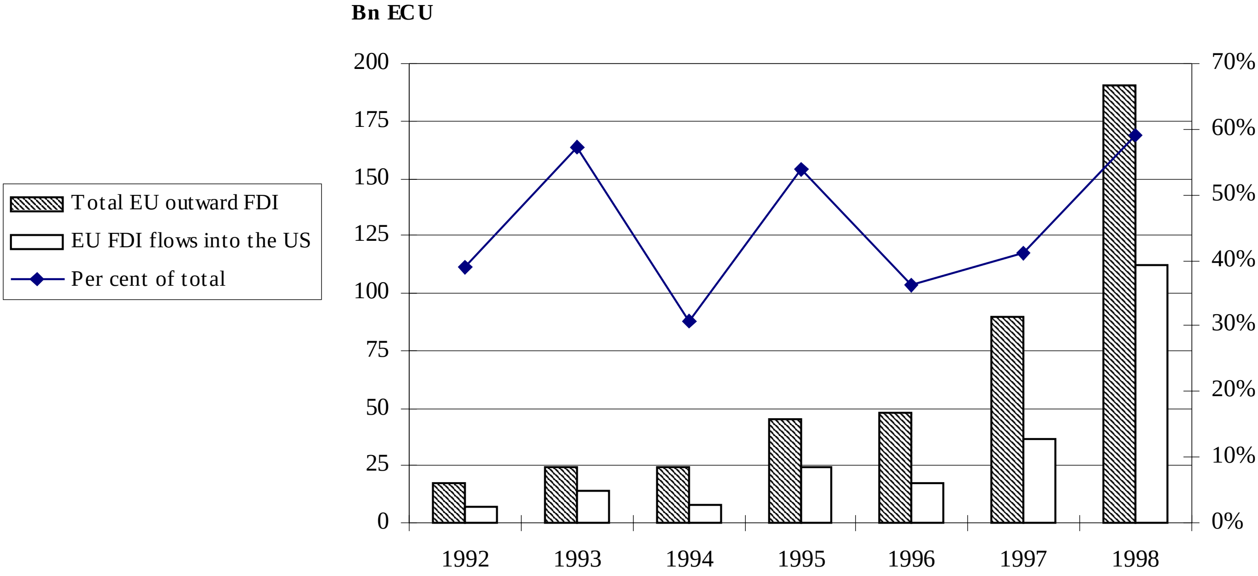
Also for services trade the EU and the US are the world's most important traders. In 1997 the EU was the world's largest exporter and importer, accounting for 24.3% and 23% respectively of world commercial services exports and imports. US shares accounted for 22.5% and 15% respectively of the world total.

Investment links

The EU and the US have by far the world's most important bilateral investment relationship and are each other's largest investment partner. The US market remained the main destination of EU foreign direct investment (FDI) with an average share of 50% between 1993 and 1998. Outflows from the EU to the US accounted for 112.3 billion ECU in 1998 or 59% of total EU outward flows thus increasing dramatically in value on the previous years. The US attracted 41% (36.9 billion ECU) of EU outward FDI flows in 1997, 36% (17.2 billion ECU) in 1996, 54% (24.5 billion ECU) in 1995, 31% (7.4 billion ECU) in 1994, 57% (13.8 billion ECU) in 1993 and 39% (6.9 billion ECU) in 1992.

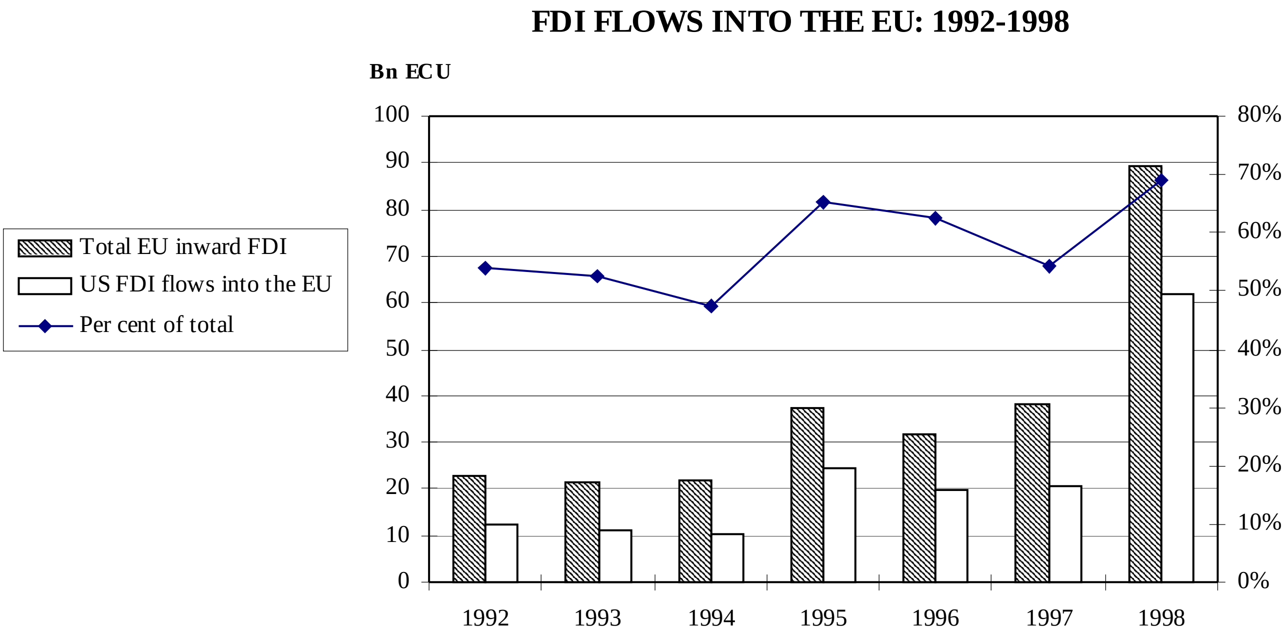
The strong FDI links between the EU and the US are confirmed by the amount of US investment into the EU. Over the period 1993-1998, the US was the top contributor to extra-EU inflows with an average share of 62%. In 1998, 69% (61.7 billion ECU) of extra-EU inflows came from the US. In 1997, 54% (20.7 billion ECU) of extra-EU inflows originated in the US, against 56% (15.9 billion ECU) in 1996, 65% (24.3 billion ECU) in 1995, 47% (10.3 billion ECU) in 1994, 53% (11.3 billion ECU) in 1993 and 54% (12.3 billion ECU) in 1992.

EU FDI FLOWS ABROAD: 1992-1998



Source: Eurostat,. FDI data do not include reinvested earnings.

Looking at FDI stocks in the EU and the US, the importance of the Transatlantic investment relationship is also evident. By 1998, cross investment stocks between the EU and the US on a historical-cost basis reached 742 billion ECU, by far the world's largest investment relationship. EU investment in the US was valued at 410 billion ECU, while the US investment in the EU was estimated at 332 billion ECU. As with the bilateral trade relationship, investment stocks are both balanced and substantial. They have also been growing very quickly over the past few years, doubling between 1989 and 1996.



Source: Eurostat,. FDI data do not include reinvested earnings.

Once again, the EU and the US are each other's largest partner. The EU is by far the biggest investor in the US accounting for 59.3% of total FDI stock in that country by 1998. The EU share has also been steadily increasing over the past decade. Likewise, the most important FDI market for the US is the EU. In 1998, 44.2% of US FDI stock was located in the EU.

The investment relationship is impressive also when analysed from an EU perspective. At the end of 1998, 48.3% of EU FDI assets outside the Union were invested in the US, and 59.8% of the EU FDI liabilities were owned by US investors.

Foreign Direct Investment, 1998

	US in the EU	EU in the US
FDI Stocks		
Bn ECU	331.8	410.4

Direct Investment Position (in percentages, 1998)

	As % of total US DI abroad	as % of FDI in the EU from abroad
US stock in the EU	44.2%	59.8%
	as % of FDI in the US from abroad	as % of total EU DI abroad
EU stock in the US	59.3%	48.3%

Sources: Eurostat.

2. GENERAL FEATURES OF US TRADE POLICY

The US Administration has stressed that its trade policy is based on the values of openness, transparency and the respect for the rule of law. These are principles to which the EU also firmly subscribes. Both regard the WTO as a fundamental element in achieving a world of open markets. Bilaterally, this shared commitment has contributed to the adoption of the NTA and has fostered the development of a healthy economic relationship. But despite this reinforced cooperation, there remain two particular tendencies in US trade policy which are sources of concern to the EU.

Problem areas: Extraterritoriality

The first is extraterritoriality. This is a long-standing feature of the US legal system manifesting itself in - amongst others - the fields of the environment, banking, tax and export control. While the EU may share some of the objectives underlying such laws, it is opposed, as a matter of law and principle, to the extraterritorial application of domestic legislation insofar as it purports to force persons present in - and companies incorporated in - the EU to follow US laws or policies outside the US and to the extent that it serves only to protect US trade or political interests. In particular, the EU opposes the extraterritorial provisions of certain US legislation that hampers international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US.

On 12 March 1996, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (referred to as the "Helms-Burton Act"). This is the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (Section 620 (a) of the Foreign Assistance Act of 1961; further reinforced by the Food Security Act of 1985 and the Cuban Democracy Act of 1992).

The EU is of the view that these measures are in part, contrary to US obligations under the WTO Agreements, in particular the GATT (General Agreements on Tariffs and Trade) and GATS (General Agreements on Trade in Services).

On 5 August 1996, the Iran and Libya Sanctions Act (referred to as "ILSA") was signed into law. The legislation provides for mandatory sanctions against foreign companies that make an investment above US$ 20 million contributing directly and significantly to the development of petroleum or natural gas in Iran and Libya. In addition, mandatory sanctions are also applicable against companies that violate the UN Security Council trade sanctions against Libya.

As a consequence, since the original bills were passed, the EU has forcefully expressed, through a number of representations and démarches, its opposition to this kind of legislation - or any secondary boycott and sanction legislation having extraterritorial effects. In particular, with regard to the Helms-Burton Act, the EU and its Member States initiated a WTO dispute settlement procedure on 3 May 1996.

Furthermore, on 22 November 1996, the EU adopted Council Regulation 2271/96, with a view to protecting the EU and its economic operators, against the effects of extra-territorial legislation of this sort adopted by third countries. Other trading partners of the US, such as Canada and Mexico, have strengthened or adopted similar blocking legislation.

On 11 April 1997 an Understanding was reached with the US concerning the Helms-Burton Act, the ILSA and the EU's WTO case regarding the former. The Understanding charted a path towards a longer-term solution through the negotiation of international disciplines and principles for greater protection of foreign investment, combined with the amendment of the Helms-Burton Act. As regards ILSA the Understanding stipulated that "the US will continue to work with the EU toward the objectives of meeting the terms" under the legislation which would permit the US President to waive the application of sanctions for EU Member States and companies. The EU agreed to suspend its WTO case, but reserved the right to restart or to re-establish the panel if action is taken against EU companies or individuals under Helms-Burton or ILSA, or waivers as described in the Understanding were not granted, or were withdrawn.

At the 18 May 1998 EU-US Summit in London, the EU and the US reached an agreement on a package of measures to resolve a dispute regarding the Helms-Burton Act and ILSA. The Summit deal offers the real prospect for a permanent solution – but still depends on acceptance by the US Congress before full implementation may take place. The three main elements of the Summit deal are:

- first, an agreement on disciplines for investments into illegally expropriated property;
- second, a US commitment to self-restraint on future extraterritorial legislation expressed in an agreement on Transatlantic Partnership on Political Co-operation.
- third, an assurance for waivers for the EU and for EU companies under both Acts.

The agreement on investment disciplines addresses the issue of whether or not investment assistance agencies of the parties should give assistance to investment projects in illegally expropriated property. This agreement is a valuable step forward in investment protection policy, which goes far beyond addressing the issue of possible illegal expropriations in Cuba.

The Understanding on Disciplines contains a clear commitment on the part of the US Administration that it will seek from Congress the authority to grant a waiver from Title IV of the Helms-Burton Act (visa restrictions) without delay. It is important to note that the EU will not apply the agreed disciplines until this waiver authority is exercised. In addition, with respect to Title III (submission of law suits against "trafficking in expropriated property") of the Helms-Burton Act, not only does the Understanding provide for a US commitment to continue to waive the right to file law-suits until the end of this President's term; the Understanding also contains a clear reference to the possibility of obtaining such a waiver on a permanent basis in the light of the EU's developing efforts to promote democracy and human rights in Cuba.

The deal on Transatlantic Partnership on Political Co-operation should be seen in conjunction with the EU's efforts to make the US Administration restrain its use of unilateral sanctions with extraterritorial effects, so-called "secondary boycotts". The Summit agreement on this issue states that the US Administration will "not seek or propose, and will resist, the passage of" such sanctions legislation.

Another element of the deal reached at the Summit relates to the ILSA. At the EU-US Summit, the US Administration did not grant the EU a multilateral regime waiver as foreseen by the 11 April Understanding. However, the US determined under section 9(c) of ILSA to waive the imposition of sanctions against TOTAL for its investment in gas exploration in the South Pars field in Iran and the US expressed its expectation that similar cases would result in like decisions for EU companies.

As regards Libya, the Summit provided for a strengthening of the US commitment to "engage with the EU in a sustained process for consideration of waivers under section 9(c) of ILSA to companies from the EU".

The agreement reached at the Summit in no way softens the EU's position that the Helms-Burton and ILSA Acts are contrary to international law. At no point in time did the EU acknowledge the legitimacy of these Acts. We have fully reserved our right to resume the WTO case against the Helms-Burton Act in the event of action being taken against EU persons or companies under either this Act or ILSA or the waivers not materialising. The agreements are of a political nature and do not in any way lend any sort of validity to the illegal provisions of the US laws in question.

Full implementation depends on Congressional support, which the Administration has undertaken to do all it can to deliver but appears not to be forthcoming. But the EU and its Member States can only fulfil the European side of the deal once the presidential waiver authority under Title IV of the Helms-Burton Act has been adopted and exercised. In the meantime, the USG continues to investigate certain EU company's investments in Cuba.

On 14 March 2000, the Iran Non-Proliferation Act (INPA) was signed into law. It provides for discretionary sanctions against foreign companies transferring to Iran goods, services and technology listed under the international export control regimes, as well as any other item prohibited for export to Iran under US export control regulations, as potentially contributing to the development of weapons of mass destruction. Reports to Congress identifying foreign entities liable to sanctions would be based on 'credible information' regarding the transfer.

This Act constitutes new extraterritorial legislation, for on the one hand, it allows the US Administration to apply its own sanctions to exports which are subject to EU Member State and EC export control regimes, while, on the other hand, it unilaterally expands the scope of export controls on EU exports beyond those multilaterally agreed upon. Its adoption is incompatible with the US commitment under the TPPC to resist the passage of extraterritorial sanction legislation.

EU concerns were repeatedly expressed in the run-up to the adoption of this Act. Taking these into account, President Clinton issued a statement at the time of signing the bill into law, undertaking to work with Congress in order to seek to rationalise the reporting requirements on transfers deemed legal under the applicable foreign laws and consistent with the multilateral export control regimes. We expect the Administration to enter soon in this negotiation with Congress to repeal the threat of sanctions against EU entities.

Several other instances and variations of US extra-territoriality can be found in, inter alia, various environmentally-driven embargoes (see section on import prohibitions), export control legislation (see section on export restrictions) as well as, at the sub-federal level, selective purchasing laws (see section on government procurement).

Unilateralism

There is a second element in US trade policy-making about which the EU has regularly complained: unilateralism. This tendency takes the form of either unilateral sanctions or retaliatory measures against "offending" countries, or companies. These measures are unilateral in the sense that they are based on an exclusive US appreciation of the trade-related behaviour of a foreign country or its legislation and administrative practice, without reference to, and sometimes in defiance of, multilaterally agreed rules. This approach casts doubt on US support for a multilateral rules-based system of addressing trade problems and can also lead to bilateral agreements with elements of discrimination.

The "Section 301" family of legislation provides a striking example of unilateral trade legislation which has been used on numerous occasions against the EU. Section 301 of the 1974 Trade Act as amended by the Omnibus Trade and Competitiveness Act of 1988 authorises the US Administration to take action to enforce US rights under any trade agreement and to combat those practices by foreign governments which the US government deems to be discriminatory or unjustifiable and to burden or restrict US commerce. In 1999, the USTR (United States Trade Representative) initiated seven new investigations, two of which were directed against the EU (alleged French Government subsidies for avionics equipment, subsequently dropped, and an EU regulation concerning geographical indications for foodstuffs and agricultural products). On 1 May 2000, USTR did not initiate any new investigations against the EU.

The Omnibus Trade and Competitiveness Act of 1988 also introduced the so-called "Super 301" provision. "Super 301" is the name given to a special initiation procedure for unfair foreign trade practice investigations following the Section 301 procedure. Originally limited to 1989 and 1990, President Clinton issued an Executive Order on Identification of Trade Expansion Priorities on 3 March 1994. Referring to the lapsed Super 301 provision, the Executive Order requires the US Trade Representative, on the basis of the information contained in the annual National Trade Estimates Report to identify "priority" unfair trade practices from "priority" countries and self-initiate Section 301 cases against them. On 27 September 1995, the President amended this Executive Order to extend it to calendar years 1996 and 1997. After a lapse of more than one year, President Clinton renewed Super 301 by Executive Order in March 1999, extending it until the end of 2001. In addition, Title VII of the 1988 Omnibus Trade and Competitiveness Act relating to the removal of government procurement barriers was renewed. Rather than identify any countries under Title VII for formal identification, USTR intends to monitor countries and cases with the potential for future identification. On 1 May 2000, USTR announced the successful resolution of German procurement decisions in the heavy electrical sector, but added Germany's so-called "sect-filter" purchasing restrictions to the monitor list.

Furthermore, the 1988 Omnibus Trade and Competitiveness Act introduced a "Special 301" procedure targeting intellectual property rights protection outside the US. Under Special 301 the USTR has created a "priority watch list" and "watch list" to identify "priority" foreign countries that are deemed to deny adequate and effective protection of intellectual property rights. Countries placed on the "priority watch list" are the focus of increased bilateral attention and USTR officially initiates investigation procedures that may eventually result in unilateral trade measures. The "watch list" is reserved for those countries that do not protect US intellectual property or that deny market access to IPR-related industries. On 1 May 2000, as a result of its annual Special 301 review, the EU, Italy, Ireland, and Greece were placed on the 2000 "priority watch list." Furthermore, Denmark and Spain were placed on the "watch list". The US warned that it would request a WTO panel concerning ex parte search remedies in Intellectual Property enforcement actions in

Denmark “unless imminent progress is made”. Shortly after the Special 301 review, the Danish Government presented a draft bill to solve the problem.

Admittedly, the US has used its unilateral trade policy arsenal more sparingly since the WTO Agreement entered into force on 1 January 1995. This Agreement provides for multilateral disciplines on a much-expanded range of economic activities (including, for instance, services, textile and clothing, agriculture and trade related intellectual property – TRIPS). It also establishes a much more effective dispute settlement system, which, in particular, makes it impossible for the losing party to block adoption of the panel report or authorisation of suspension of concessions. The counter-part to this is that the Dispute Settlement Understanding (DSU) explicitly obliges parties to follow the multilateral dispute settlement procedures and to refrain from unilateral determinations of non-conformity and unilateral sanctions.

Until recently, for issues covered by the WTO, the US has generally refrained from unilateral action, with the notable exception of the bananas case. There, in order to comply with the time limits imposed by the Section 301 legislation, the US did not use the obligatory procedure provided by the DSU to solve its disagreement with the EU over whether the new EU banana regime was in conformity with WTO rules. Instead, the US directly requested the WTO to authorise it to suspend concessions against the EC, in violation of normal WTO procedures. On 19 April 1999 the US received WTO authorisation to suspend concessions for an amount of $191.4 million. In response, the US compiled a list of products, which were subject to a conditional liability of 100% custom duties. As a result of the Beef-Hormones case, the WTO authorised the suspension of concessions to the amount of $116.8 million and a further list was compiled (of mainly agricultural products) subject also to a conditional liability of 100% customs duties.

The reaction of the EU has been firm, but in full compliance with WTO rules. The EU has initiated two dispute settlement actions before the WTO, one against the specific US measures described above, and one against Sections 301 to 310 of the 1974 Trade Act. The reason for challenging the legislation itself is that this legislation mandates USTR to take this kind of unilateral action within time frames that in certain cases cannot possibly comply with WTO rules. This is true, in particular, for cases where the US should follow the procedure of Article 21.5 DSU to resolve disagreements over the WTO compatibility of measures taken by other Members to implement panel rulings. The Section 301 legislation simply does not permit USTR to follow this multilateral, obligatory route.

A WTO panel has ruled on 8 November 1999 that the statutory language of Sections 301 to 310 of the 1974 Trade Act was as such inconsistent with the rules of the WTO Dispute Settlement Understanding. Indeed, the panel stressed that the US trade legislation was at odds with the predictability of the multilateral trading system. However, because the US administration through a Statement of Administrative Action had undertaken to always act in a manner consistent with the US obligations under the WTO, the panel concluded that as long as the undertaking was respected, no violation was taking place. The practical result of this ruling has been to make Sections 301-310 ineffective against WTO members.

The EU has also been extremely critical of the “carousel” legislation enacted on 18 May 2000 (Section 407 of the Trade and Development Act of 2000). This legislation provides for a mandatory and unilateral revision of the list of products subject to suspension of GATT concessions 120 days after the application of the first suspension and then every 180 days thereafter, in order to affect imports from

Members which have been determined by the United States not to have implemented recommendations made pursuant to a WTO dispute settlement proceeding. The EU believes that such type of shotgun legislation is fundamentally at odds with the basic principles of the Dispute Settlement Understanding.

In addition, in cases where bilateral (as opposed to WTO) agreements are alleged to have been violated, Section 301 is still regularly used as a unilateral trade policy instrument. Under the various elements of Section 301 legislation, trading partners are given no choice but to negotiate on the basis of an agenda set by the US, on the basis of judgements, perceptions, timetables, and indeed, US legislation. World trade problems should not be solved through forced settlements based on a unilateral determination of unfairness, unilateral timetables, and the threat of unilateral trade action if no agreement is reached.

3. TARIFF BARRIERS

3.1 Applied Tariff Levels

Tariff peaks

Despite the substantial tariff reduction and elimination agreed in the Uruguay Round, the US retains a number of significant duties and tariff peaks in various sectors including food products, textiles, footwear, leather goods, jewellery and costume jewellery, ceramics, glass, trucks and railway cars.

The Information Technology Agreement

With regard to information technology (IT) products, the Information Technology Agreement (ITA) providing for the complete elimination of tariffs by the year 2000 on a large number of products was concluded in March 1997 and was implemented as of July 1997. The main elements of the new US tariff structure can be summarised as follows: elimination of tariffs on all semiconductors, computers, computer peripherals and computer parts, electronic calculators, telecommunication equipment, electronic components (capacitors, resistors, printed circuits), semiconductor testing and manufacturing equipment and certain consumer electronic items. Although tariffs on optical fibre cables will be eliminated under the ITA, the US refused to do the same for optical fibres on which they maintain a rather substantial protection; also tubes for computer monitors are excluded from the tariff elimination. At the time of writing, attempts to broaden the scope and coverage of products of the ITA in the form of the ITA II have so far failed.

Spirits

Pursuant to the ITA agreement reached at the WTO Singapore Ministerial Conference, the US eliminated duties on all spirits from 1 January 2000.

Banana dispute

In a ruling from the World Trade Organisation (WTO) on 6 April 1999, various elements of the EU's revised banana import regime, which came into force on 1 January 1999, were found to be inconsistent with WTO rules. The EU upholds the importance of abiding by WTO rules, and is currently working on a new banana regime which would be fully consistent with our WTO obligations, on the basis of a Commission proposal of July 2000. In this context, the EU has been engaged in intense discussions with the WTO Members concerned, in particular the US.

On 9 April 1999, USTR published a list of products, covering trade in an amount of US$ 191.4 million per year, on which the US imposed a retaliatory duty (ad valorem rate of 100%). The Member States affected were: Austria, Belgium, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden and the United Kingdom.

As a result of the "carousel" legislation a new list is expected in the near future.

Beef Hormones dispute

The decision by a WTO panel of August 1997 that EC measures against hormones in beef were not in compliance with WTO rules was submitted to the Appellate Body in September 1997. The body overruled the earlier panel but recommended that the EC bring its measures into conformity with obligations under the SPS Agreement. The Arbitrator granted the Community a deadline of 13 May 1999 in which to implement those recommendations.

On 17 May 1999, the US requested the Dispute Settlement Body of the WTO to allow the suspension of tariff concessions to the EC and its Member States and on 12 July 1999, the WTO Arbitrator determined that the level of impairment suffered by the US was $116.8 million.

In reaction to this, the US suspended the application of tariff concessions by imposing a 100% ad valorem rate of duty on a list of mainly agricultural products from 29 July 1999 onward.

The same "carousel" legislation applies to this list and as such the US is expected to announce a revised version in the near future.

Ceramics and Glass

At the end of the Uruguay Round, customs duties on ceramics and glass products remain relatively important and higher in the US than in Europe. During the Uruguay Round the US rejected the Community's offer to abolish tariffs in this sector, even though Mexico, one of Europe's leading competitors in the US market, should, after a transitional period, enjoy a zero rate by virtue of the NAFTA (North American Free Trade Agreement). There are products of importance for EU trade which will continue to be confronted by high tariffs even when the Uruguay Round reductions have been fully implemented. These include hotel and restaurant ware, on which the duty rates currently are 30% if made of porcelain or china and 31.5% for others, and certain drinking glasses and other glassware on which the duty rates currently are 33.2% and 38% respectively.

Textiles and Leather

The average trade weighted reduction made by the US in the Uruguay Round was only 12% for textiles and clothing and 5.2% for footwear. (For textiles and clothing the reductions which were made will be implemented over ten years). This means that many significant tariffs and tariff peaks will remain on products of export interest to the EU even when the Uruguay Round reductions have been fully implemented. These include certain woollen fabrics and articles of apparel for which the current duty rates are 31.5% plus a specific rate and 33.3% respectively.

Jewellery

The US jewellery sector is protected by an average tariff of 6% with the highest post Uruguay Round tariff being 13.5%. The corresponding EU rates stand between 2.5% and 3%. Furthermore, the US maintains very significant import duties on certain semi-finished products made of precious metals. Because of the very high incidence of raw material cost in this sector even modest tariff barriers significantly reduce the access of European jewellery products to the US market.

3.2 Tariff Quotas

Agriculture and Fisheries

The import of certain agricultural products into the US takes place mainly under WTO bound tariff quotas. The EU is monitoring closely the management of such quotas by the US Administration.

The EU remains concerned about certain in-built rigidities in the licensing import system for dairy products. This is in part based on historical trading and results in licences being awarded to companies who no longer trade in milk products. The division of EU quotas for certain cheeses into Tokyo Round quantities and Uruguay Round quantities should be eliminated. This amalgamation is particularly needed for Swiss or Emmenthaler type cheeses and for the NSPF (not specifically provided for) group, for example. One EU quota for each cheese group would make these quotas more transparent, comprehensible and accessible.

As regards the management of tariff quotas for tobacco, the EU is concerned that the methods applied seem more restrictive than necessary and have the potential to create obstacles to EU exports.

4. NON-TARIFF BARRIERS

4.1 Registration, Documentation, Customs Procedures

Excessive invoice requirements

Invoice requirements for exporting certain products to the US can be excessive. The information requirements far exceed normal customs declaration and tariff procedures. They are unnecessary because US Customs are entitled to ask for all necessary supplementary documents and information during clearance (as provided for by the Kyoto Convention). There should be no systematic demand for this kind of information. These formalities are also burdensome and costly, thus constituting a barrier against new entrants and small companies. As a result, large established suppliers are privileged and small and new competitors disadvantaged. These effects are particularly disruptive in diversified high-value and small-quantity markets that are of special relevance for the EU.

US Customs does not recognise the EC as a country of origin and refuses to accept EC certificates of origin. This means that in order to justify EC country of origin status, EU firms are required to furnish supplementary documentation and follow further procedures, which can be a source of additional costs.

Textiles and Leather

Customs formalities

Customs formalities for imports of textiles, clothing and footwear to the US require the provision of particularly detailed and voluminous information. Much of this information would appear to be irrelevant for customs or statistical purposes. For example, for garments with an outer shell of more than one construction or material, it is necessary to give the relative weight, percentage values and surface area of each component; for outer shell components which are blends of different materials, it is also necessary to include the relative weights of each component material.

Origin rules

On 1 July 1996, the US introduced a wholesale revision of its origin rules for textiles and clothing products. While for many textile and clothing products these US origin rules paralleled those of the EU, printing and dyeing of fabric no longer conferred origin as it did under the former US rules.

A Trade Barriers Regulation procedure was initiated on 22 November 1996 further to a complaint lodged by the Italian textile industry and led to the adoption of a Commission decision to request WTO consultations. The investigation carried out by the Commission services demonstrated that the US legislation was notably in breach of the WTO Agreement on Textiles and Clothing and the WTO Agreement on Rules of Origin.

After receiving a request for WTO consultations from the EU, the Administration eventually agreed in July 1997 to the modification of the contested rules, at the latest at the end of 1998. The US agreed to modify its rules of origin either by adopting the solution resulting from the international harmonisation process or, if such negotiations failed to reach an agreement by the July 1998 deadline, by reverting to its previous rules of origin. The US also agreed to a number of transitional measures aiming at ensuring that, in the meantime, the EU products' access to the US market would not be disturbed or diminished.

The case has been resolved finally by section 405 of the Trade and Development Act of 2000, enacted on 18 May 2000 plus silk labelling legislation (PL 106-36) enacted in June 1999.

Agriculture and Fisheries

The US has introduced a compulsory system of certificates of origin for yellowfin tuna caught in the Eastern Tropical Pacific since July 1992. Certification rules are also applied for countries using large-scale trawl nets.

The US Code, Title 46, Shipping, Section 12108, blocks the potentially interesting possibility for EU fishermen to fish in US waters under a US flag since foreign-built US flag vessels cannot be documented with a fishery endorsement, thereby also preventing the possibility of joint ventures and joint enterprises. The American Fisheries Act of 1998 included a provision that amends the percentage of shares in a vessel that must be held by US citizens in order for the vessel to be considered a US vessel. The necessary percentage of ownership shares was increased from 50% to 75%.

4.2 Levies and Charges (Other than Import Duties)

User fees

The need to tackle the budget deficit without increasing taxes has led to the establishment of a series of user fees by which the user of a particular (formerly free) service pays an amount presumed to cover the cost of the service provided.

As a result of laws enacted in 1985 and 1986, the US imposes user fees on the arrival of merchandise, vessels, trucks, trains, private boats and planes, as well as passengers. The Customs and Trade Act of 1990 and the Omnibus Budget Reconciliation Act of 1990 extended and modified these provisions by, among other things, considerably increasing the level of the fees. Excessive fees levied for customs, harbour and other arrival facilities, that is for facilities mainly used by importers, place foreign products at an unfair disadvantage vis-à-vis US competition.

The most significant of the customs user fees is the Merchandise Processing Fee (MPF). The MPF is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act and the Andean Trade Preference Act, and from US offshore possessions. It is also levied on merchandise entered under Schedule 8, Special Classifications, of the Tariff Schedules of the US. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21% ad valorem on formal entries with a maximum of US$ 485 as from 1 January 1995. Whilst the MPF was to last until 30 September 1990 when established, it is now set to run until 30 September 2003.

At the request of Canada and the EU, the GATT Council instituted a Panel in November 1987 that stated that the US Customs user fees for merchandise processing were not in conformity with the General Agreement. The Panel ruled that customs user fees should reflect the approximate cost of customs processing for the individual entry in question. This principle was not met by an ad valorem system such as that used by the US. The GATT Council adopted the Panel report in February 1988.

The present customs user fee structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely, in many cases, to exceed the cost of the service rendered since, irrespective of the level, it is still based on the value of the imported goods.

Harbour Maintenance Tax and Harbour Services Fee

US Customs also participates in the collection of the Harbour Maintenance Tax (HMT). The HMT is levied in all US ports on waterborne imports, at an ad valorem rate of 0.125%. Collected monies are transferred to the Harbour Maintenance Trust Fund to provide for the operation and maintenance of channels and harbours. However, the ad valorem basis for the HMT collection makes it difficult to justify as a fee approximating the cost of the service provided.

Moreover, there is a significant accumulation of unused funds, which reached US$ 1.4 billion in fiscal year 1998 and is projected to rise to US$ 2.2 billion by fiscal year 2000. This points to the excessive nature of the HMT.

The US Court of International Trade in October 1995 ruled that under US law the HMT is a tax and not a user fee. Taxes on exports are prohibited by the US Constitution. The US Court of Appeals confirmed this ruling in June 1997 as did the US Supreme Court in March 1998. As a result, the US authorities have stopped collecting HMT on exports. However, the HMT is still being collected on imports.
In March 1998, the EU requested WTO dispute settlement consultations to challenge the imposition of HMT on imports. Two rounds of consultations were held in Geneva on 25 March and 10 June 1998. On 30 April 1999, the Administration introduced a bill to replace the HMT with a new Harbour Services Fee (HSF), H.R. 1947. This new fee would not only finance port operation and maintenance, as the HMT did, but also new port construction, for a total amount of US$1 billion per year. The full costs of those activities, which benefit the entire US economy, would have to be borne by a small group of economic operators, namely shipping lines. In legal terms, the proposed legislation would duplicate many of the WTO problems inherent in the HMT. Most importantly, the so-called “fee” would still be a tax rather than a true user fee, since the charges would not be directly and proportionately related to any true service provided in each individual instance to a vessel and the goods it carries. This is clear, for instance, from the fact that:

- fixed rates are charged for all port visits in the US, whether or not the port in question needs port maintenance or new port construction;

- container ships are significantly overcharged compared to, for instance bulk ships, noting that imports use a proportionately higher share of container ships than US domestic shipments and exports;

- many exemptions exist for different kinds of US vessels and for shipments between the US mainland and Alaska, Hawaii and US possessions.

The EU therefore does not support adoption by Congress of the bill as proposed by the Administration, and is closely monitoring the current inter-agency review of the financing of US harbour maintenance.

<u>Automotive</u>

The US levies the following three taxes/charges on the sales of cars in the US that raise concern to European automakers: the Luxury Tax, the Corporate Average Fuel Economy (CAFE) payment and the so-called Gas Guzzler Tax.

The Luxury Tax is an excise tax imposed since 1990 on cars valued above an arbitrary threshold, currently around US$ 36,000. The tax has a higher incidence on imported cars than on US produced cars. Originally it also applied to leisure boats and jewellery but these items were later exempted due to pressure from US producers. The luxury tax is scheduled to be eliminated in 2003, with the tax levied falling from 5% in 2000, to 4% in 2001, and 3% in 2002.

The CAFE payment is a civil penalty payment levied on a manufacturer or importer whose range of models has an average fuel efficiency below a certain level, currently 27.5 miles per gallon (mpg). CAFE favours large integrated automakers or producers of small cars rather than those who concentrate on the top end of the car market, such as importers of European cars.

The so-called Gas Guzzler Tax is an excise tax of US$ 1,000 - 7,700 per car, levied on all cars not meeting fuel economy standards set by the US Environmental Protection Agency (EPA), currently 22.5 mpg. This fuel economy cut-off point is not founded on any reasonable or objective criterion and leads to discrimination against imported cars.

European automakers, with a total market share in the US of only 4%, bear nearly 70% of the revenue generated by the luxury tax, 85% of that by the Gas Guzzler tax and almost 100% of the CAFE penalties.

Shipbuilding

The US applies a 50% ad valorem tax on non-emergency repairs of US owned ships outside the US and on imported equipment for boats, including fishnets on the basis of Section 466 of the Tariff Act of 1930, as amended in 1971 and 1990. Under the latter amendment the tax would not apply, under certain conditions, to foreign repairs of "LASH" (Lighter Aboard Ship) barges and spare vessel repair parts or materials. The implementing legislation of the OECD Shipbuilding Agreement should make appropriate provision for abolition of this tax as applicable to the contracting parties of the Shipbuilding Agreement (not yet entered into force).

4.3 Import Prohibitions

The right of sovereign nations to take measures to protect their essential national security interests has been widely recognised by multilateral and bilateral trade agreements. However, it is in the interest of all trade partners that such measures are prudently and sparingly applied. Restrictions to trade and investment cannot be justified on national security grounds if they are, in reality, essentially protectionist in nature and serve other purposes than the protection of security interests.

National security based restrictions

Under Section 232 of the Trade Expansion Act of 1962, US industry can petition for the restriction of imports from third countries on the grounds of national security. Protective measures can be used for an unlimited period of time. The Department of Commerce (DoC) investigates the effects of imports that threaten to impair national security either by quantity or by circumstances. Section 232 is supposed to safeguard US national security, not the economic welfare of any company, except when that company's future may affect US national security. The application of Section 232 is not dependent on proof of injury to US industry.

In the past, the EU has voiced its concern that Section 232 gives US manufacturers an opportunity to seek protection on grounds of national security, when in reality the aim is simply to curb foreign competition. The EU will continue to monitor closely the impact of these restrictions.

Agriculture and Fisheries

Tuna-Dolphin

The Marine Mammal Protection Act of 1972 (MMPA) aims at protecting marine mammals, particularly dolphins, by progressively reducing the acceptable level of dolphin mortality in US tuna-fishing operations in the Eastern Tropical Pacific (ETP) Ocean and providing for sanctions to be taken against other countries which fail to apply similar standards for dolphin protection. “Primary” embargoes are currently being applied to imports of certain yellowfin tuna products from Mexico, Panama, Colombia, Vanuatu and Venezuela. “Secondary” embargoes on yellowfin tuna products are imposed on imports from “intermediary nations” – namely, countries which are exporting to the US and have failed to certify that they have not imported from the primary embargoed countries during the preceding six months. Costa Rica, Japan and Italy are currently subject to such a secondary embargo.

Mexico, as a primary-embargoed country, requested a GATT Panel in November 1990. The Panel concluded that the US primary and secondary embargoes were not in conformity with GATT Article XI (Elimination of Quantitative Restrictions) but the Panel’s report was never adopted. Subsequently the EU requested the establishment of a further GATT Panel in February 1993 which found against the US’ unilateral measures imposed for environmental reasons and it reiterated that trade measures cannot be imposed with a view to forcing other countries to change their environmental and conservation policies within their own jurisdiction. Again, this Panel’s report was not adopted.

In the framework of IATTC (Inter-American Tropical Tuna Commission) the members (including the US, the Central American and Latin American countries) have negotiated and agreed upon an Agreement on the International Dolphin Conservation Program (IDCP) and adopted it in February 1998. The Agreement was opened for signature from 21 May 1998. The entry into force of this Agreement will allow the US to lift its import embargo. The international agreement on the IDCP became effective on February 15, 1999, when the fourth country ratified. The US, Panama, Ecuador, and Mexico are the countries that have ratified to date. On March 3, 1999, the US Secretary of State provided the required certification to Congress that the international agreement on the IDCP was in force. Key provisions of the US IDCP Act became effective on this date. The US will allow imports of tuna harvested under the IDCP to carry a dolphin-safe tuna label only if no dolphin were killed or seriously injured during a set in which tuna were caught.

Previously, tuna products containing tuna harvested in the ETP could be labelled "dolphin-safe" only if no intentional setting on dolphins occurred during the fishing trip. When the new definition goes into affect in the Fall, tuna may be labelled "dolphin-safe" only if no dolphins were killed or seriously injured during the set in which the tuna were caught. The EU is presently not a member of IATTC, but the Council has authorised the Commission (by a decision of 22 April 1999) to negotiate with the ICCAT (International Commission for the Conservation of Atlantic Tunas) members the necessary amendments to the Convention as to permit the EU accession. The Community intends to sign the IDCP at the earliest possible time and will in the meantime apply the Agreement provisionally.

Drift net fishing

Furthermore, amendments to the Magnuson-Stevens Fishery Conservation and Management Act of 1983 (MFCMA) require the DoC to list nations whose nationals engage in large-scale drift net fishing in a manner unacceptable to the US authorities. Such a nation may be certified for the purposes of the so-called “Pelly Amendment” and its marine products may be consequently embargoed.

The Commerce Department identified on March 19, 1999 an EU Member State (Italy) as a nation whose fishing vessels may be conducting high sea, large-scale driftnet fishing in violation of the High Seas Driftnet Fisheries Enforcement Act.

The DoC action carried out the order of the US Court of International Trade in New York to identify Italy as a nation for which there is reason to believe its fishermen or vessels are violating the ban on large-scale driftnets used in commercial fishing operations. According to the Act, the two nations have 30 days to commence consultations and 90 days to conclude them before Italy may become vulnerable to trade restrictions.

Shrimp

Pursuant to section 609 of Public Law 101-162 exports of shrimp to the US will be embargoed unless nations can provide evidence that their shrimp trawlers match US efforts to protect sea turtles (artisanal fishing, having a sea turtle excluder program or fishing for cold-water shrimp only). The US authorities have now certified forty-two nations, but five Member States (France, Spain, Portugal, Italy and Greece) have not been certified. Portugal presented a démarche to the Department of State in May 1996 underlining, inter alia, its concerns regarding the potential extraterritorial effect of this legislation. Following WTO consultations in December 1996, Thailand, Malaysia, Pakistan and India requested the establishment of a Panel (January-February 1997). The EU participated as a third party.

The Panel report of 15 May 1998 concluded that the US import ban on shrimps and shrimp products is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994. The report was very critical on the unilateral measures carried out by the US as well as the lack of commitment to reach a negotiated, multilateral solution. In July 1998, the US filed an appeal of the Panel findings.

Although the Appellate Body of the WTO to some degree reversed the findings of the Panel by agreeing that the US measure served an environmental objective recognised as legitimate under GATT Art. XX(g), the measure had been applied by the US in a manner that constitutes an arbitrary and unjustifiable discrimination between members of the WTO where the same conditions prevail.

The Appellate Body further stressed that the US should have consulted and negotiated with the other countries involved and tried to reach a multilateral agreement on turtle protection. Finally, the Appellate Body concluded that the US authorities should bring its measure into conformity with the obligations of the US under the GATT Agreement.

Dairy products

The import of dairy products made from unpasteurised milk such as soft cheese, for which there is a ready market in the US is generally prohibited, even though a number of US States permit the production and marketing of such products. The import of fresh dairy products, such as yoghurts, is effectively prohibited through the application of the Import Milk Act.

The import of milk protein into the US is generally permitted. The EU has a substantial export to the US of milk protein used by especially the meat and bread industries in their processing. The most obvious customer, the yoghurt industry is, however, not allowed to use imported proteins, unless they originate in industries, that are Grade A approved by the US authorities. No EU dairy is Grade A approved, and it seems impossible to become Grade A approved. Numerous meetings with the FDA have not solved the problem.

4.4 Import Quotas

Fisheries

Allocations to foreign fishing fleets

Each year, the US fixes the total allowable level of foreign fishing (TALFF) and accordingly makes allocations to foreign fishing fleets. Squid fishing opportunities for EU vessels off the east coast of the US have been gradually phased out under the terms of both the Magnuson-Stevens Fishery Conservation and Management Act (MFCMA) and the former Governing International Fisheries Agreement (GIFA) in favour of the development of the US domestic fishing industry. Though mackerel migrating off the east coast is the only stock currently identified as being in surplus in the US Exclusive Economic Zone, the US authorities have set a zero TALFF since 1990 for this stock, following pressure from the domestic industry to protect its markets. The EU believes that this line neither corresponds to the provisions and intentions of the MFCMA or to the provisions of Article 62 of the UN Convention on the Law of the Sea.

4.5 Standards and Other Technical Requirements

Complex regulatory system

In the US, products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Even if, in general, not intentionally discriminatory, the complexity of US regulatory systems can represent an important structural impediment to market access. For example, it is not uncommon that equipment for use in the workplace is subject to US Labor Department certification, a county authority's electrical equipment standards, specific regulations imposed by large municipalities, and other product safety requirements as determined by insurance companies.

This situation is aggravated by the lack of a clear distinction between essential safety regulations and optional requirements for quality, which is due in part to the role of some private organisations as providers of assessment and certification in both areas. Moreover, for products where public standards do not exist, product safety requirements can change overnight as the product liability insurance market makes a new assessment of what will be required for insurance purposes.

The WTO Agreement on Technical Barriers to Trade (TBT) covers the rules for standards, technical regulations and conformity assessment procedures. The TBT Agreement is applicable to all WTO Members, and provides, *inter alia*, that its Members must use international standards as the basis for their technical regulations, standards and conformity assessment procedures. However, it provides for certain exceptions for specific, legitimate objectives, such as protection of human health and safety, plant and animal health, and protection of the environment, where the international standards are inadequate for the purpose. The TBT Agreement is intended to ensure that technical regulations and conformity assessment procedures are not more trade restrictive than required for the legitimate purpose of the regulations concerned and the risks they are designed to cover.

The EU believes that the TBT Agreement provides an excellent base on which to tackle technical barriers to trade at the multilateral level. It specifies stricter disciplines in many of the areas of concern discussed below, such as the use of international standards, labelling requirements and sub-federal standards. The Agreement also provides for further bilateral follow-up actions. In this context, the EU and US recently concluded a Mutual Recognition Agreement and are working towards regulatory co-operation to augment the impact of the existing sectoral dialogues.

Non-use of international standards

However, a particular problem in the US is the relatively low level of use, or even awareness, of standards set by international standardising bodies. All parties to the TBT Agreement are committed to the wider use of these standards; but although a significant number of US standards are claimed to be "technically equivalent" to international ones, and some are indeed widely used internationally, very few international standards are directly adopted. Some US standards are in direct contradiction to them. The EU has attempted to clarify some of these issues in discussions in the TBT Committee in Geneva, and in particular, to establish the position of international standards bodies in the context of the Agreement, but at present agreement with the US has been difficult to reach. Discussions in the WTO on conformity assessment issues are progressing but are at an early stage.

Illustrative cases:

Fastener Quality Act

The 1990 Fastener Quality Act (FQA) aims to deter the introduction of sub-standard industrial fasteners into the US. Amendments to the FQA and its implementing regulations have introduced burdensome and costly accreditation and certification procedures as well as discriminatory record-keeping and documentation requirements. Industry on both sides of the Atlantic expressed serious concern with the FQA and its proposed implementation by the Department of Commerce. The FQA was discussed on several occasions between the EU and US and negotiations on mutual recognition of conformity assessment procedures with respect to fasteners took place, although a final agreement was never reached. Industry concerns, EU-US discussions, and the recognition that major improvements in manufacturing and quality control systems since the adoption of the original Act led to the enactment on 8 June 1999 of the Fasteners Quality Amendments Act of 1999 (PL 106-34). The new legislation exempts most fasteners from the FQA. Subject to further verification, the revised FQA should address most of the problems that industry would otherwise have encountered.

Nutrition labelling

The Nutrition Labelling and Education Act 1990 requires certain products to be labelled regarding their content. The EU is concerned that the rules differ from international standards on labelling established by the Codex Alimentarius (upon which the corresponding EU legislation is based) and, furthermore, that this legislative action would have serious negative consequences on EU-US trade in foodstuffs and result in significant commercial obstacles to EU food products marketed in the US and vice-versa.

Excessive reliance on mandatory certification

Against the background of an international trend towards deregulation or the minimising of third party intervention in the regulatory process, one problem experienced in the US is the continued reliance on third party conformity assessment procedures for many industrial products.

In several sectors, such as that of electrical equipment and domestic appliances, technological development and consumer awareness have permitted public regulators around the world to reduce the extent of pre-marketing third party testing and certification in favour of self-certification by manufacturers backed up by post-market surveillance and control. In the US however, third party certification in these sectors is still mandatory (de jure and/or de facto), and as such may pose disproportionately high costs on suppliers to the US market.

As far as IT products are concerned, since they are subject to continuous testing and assessment in their development and production process, it should be unnecessary to repeat such tests by a third party. Industry stresses the advantages of an appropriate “supplier declaration of conformity”. US regulatory agencies have begun a review of this approach, and are moving in certain instances towards manufacturer’s declarations of conformity (PCs, VCRs, for example).

Regulatory differences at State level

There are more than 2700 State and municipal authorities in the US which require particular safety certifications for products sold or installed within their jurisdictions. These requirements are not always uniform or consistent with each other, or even transparent. In particular, individual States sometimes set environmental standards going far beyond what is provided for at Federal level. Agricultural and food imports are also often confronted with additional state-level requirements, which may lead to obstacles to trade.

Acquiring the necessary information and satisfying the necessary procedures is a major undertaking for a foreign enterprise, especially a small or medium sized one, as at present there is no central source of information on standards and conformity assessment. One company has estimated the volume of lost sales in the US due to the multiplicity of standards and certification problems to be about 15% of their total sales. The expense of certification alone was put at 5% of total sales, as was the amount spent on product liability insurance (a far less significant factor in Europe).

The hidden costs could be much greater because the time and cost involved can be greatly reduced simply by using US components that have already been individually tested and certified. This is particularly the case for electrical products.

In addition, the private organisations providing quality assurance may impose the use of certain specific product components under their own programmes that are not in conformity with international quality assurance standards (such as the International Organization for Standardization (ISO) 9000 series). In some cases (e.g. that of telecommunications network equipment) an expensive evaluation procedure is required which does not lead to certification and does not take account of any additional requirements by individual buyers.

For electrical appliances Underwriter’s Laboratories (UL) have complete discretion on the standards concerning safety certification and, on occasion, can make seemingly arbitrary changes to them. UL lists the products that comply with the applicable standards, but they do not approve them. This is done by a variety of competing testing and certification agencies, some of them offering testing facilities in Europe.

For example, in early 1993 UL revised standard 1028 on hair clipping and shaving appliances, amending the specifications for the on/off switch. The new UL requirement adds nothing to the safety of these appliances, but adds considerable costs to European manufacturers. It has also required the subsequent modification of the related International Electrotechnical Commission standards (endorsed by the Comité Européen de Normalisation Electrotechnique (CENELEC) [European Electrotechnical Standards Committee]).

Labelling requirements

Providing consumers with accurate, useful information is certainly in everyone’s best interest. However, sometimes the information required to be put on a label seems to be specifically designed to influence consumer behaviour. For other products, labelling requirements seem to be another way of slowing down the process of getting a new product to the market. As in the case of origin certificates, labelling and marking requirements do not recognise the use of the notion "Made in EC".

Automotive

The American Automobile Labelling Act provides that passenger cars and other vehicles must be labelled with, inter alia, the proportion of US- and Canadian-made parts and the final point of assembly. These requirements appear to be intended to influence consumers to buy cars of US-Canadian origin. There is also an obligation to indicate the origin of engines and gearboxes that could discourage US manufacturers from importing parts from Europe. Moreover conforming to the labelling requirement may involve the disclosure of confidential data from non-US manufacturers.

Pharmaceuticals

Approval procedures for drugs and drug ingredients

In the US, as in Europe, a competent authority (the Food and Drug Administration (FDA) in the US) must approve a new medicinal product before it can be commercialised. However, the delays for non-US new medicinal products appear to be longer than for US developed medicinal products. This may be in part due to the Investigational New Drug (IND) system that allows the FDA advanced knowledge of medicinal products tested in clinical trials in the US.

By means of an "over-the-counter" (OTC) procedure, approved active substances for a medicinal product are put on a list (OTC-Monograph) by the FDA, so that different final products derived from these active substances can be marketed without any application or delay. However, the OTC drug approval procedure requires that the active substance has a US market history. This restricts market access for OTC products with lengthy marketing experience in countries with equally sophisticated drug regulatory systems and particularly hampers access for plant-based (herbal) medicinal products with a long tradition in Europe. The OTC monograph was published on 17 March 1999 but does not yet allow for the acceptance of foreign clinical data for ingredients commonly used in Europe but not in the US.

In addition, the problem of admission of European suntan lotions to the US market was first raised with the FDA in 1991. The FDA also received a petition by European cosmetic firms to open the simplified drug approval procedure to UV-filters that had already been accepted in the EU. The FDA did approve sunscreen products containing avobenzone in concentrations of up to 3%; however, the final monograph covering this and other sunscreen products was published on 21 May 1999. Should the FDA follow the monograph's conclusions, all of the characteristics of the label on a sunscreen product such as the size of the type, the size of the lines, the words used, and that the label would have to use black type against a light background, which can impair a brand's identity.

A multilateral framework for cooperation on cosmetics has been established between the EU, US, Canada, and Japan. A work programme on regulatory cooperation has been established with a view to align review and approval procedures and examine equivalence of technical requirements.

Textiles and Leather

Marking requirements

Extensive product description requirements complicate exports to the US. Particular rules for marking and labelling of retail packages to clarify the country of origin, indicate the ultimate purchaser in the US and state the name of the country in which the article was manufactured or produced are burdensome. Articles that are otherwise specifically exempted from individual marking are an exception to this rule. All textile fibres imported to the US have to be marked with the generic names and percentages by weight of the constituent fibres present in the textile fibre product in amounts of more than 5%. Any wool products containing woollen fibre, with the exception of carpets, rugs, mats, upholsteries and articles made more than 20 years prior to importation, have to be clearly marked so as to satisfy the requirements of the Wool Products Labelling Act of 1939 (with regard to information on weight and importer). The Fur Products Labelling Act imposes similar obligations on fur products.

Agriculture and Fisheries

Wine labelling

With respect to wine labelling, there exist procedures, both at Federal and State level, for the approval of labels on the front and rear of wine bottles. In general, a certain time period is required to obtain label approval at Federal level and, at State level, the approval period varies according to the State. This renders the approval procedure time-consuming, confusing to exporters (who have to comply with different State regimes) and costly. In addition, European exporters are geographically disadvantaged in the sense that they have to send the original label to the competent US authorities while the US producers can do that with the different offices located in the main producer regions.

Sanitary and phytosanitary issues delays at customs controls

Differences in US and EU sanitary and phytosanitary requirements can have restrictive effects on trade. For new non-manufactured agricultural products, there are requirements for import permits to the US. The procedures between application and the inclusion in the list of approved products are excessively long, up to several years. This has been experienced also in cases where other products from the same area of production with the same phytosanitary risks were permitted. A variety of EU exports to the US have encountered problems due to delays in US Customs sampling and inspection procedures, resulting in damage to the goods and subsequent commercial losses for the exporters. The EU does not dispute the right of the US authorities to inspect imported goods but considers that adequate steps should be taken to deal expeditiously with perishable goods.

Canned peaches

In particular, the FDA's time-consuming controls on the detection of pit fragments in imports of canned peaches from the EU led to detention and subsequent destruction or obligatory re-export of this product, hampering the flow of trade and negatively affecting the volume of exports.

Apples and pears

Regulations governing the entry of apples and pears from certain Member States (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III, §319-56-2r) provide for a pre-clearance inspection programme, with the aim of guaranteeing, prior to shipment, that consignments are free from certain specified insect pests such as the pear leaf blister moth, and from "other insect pests that do not exist in the US or that are not widespread in the US."

Operating in this way on the basis of an open list of unspecified pests is not a scientific approach and is contrary to the spirit of transparency as provided for in the International Plant Protection Convention and to the requirement of pest risk analysis and transparency laid down in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The stringent inspections and the increased costs arising from the pre-clearance inspection programme have clearly had a negative effect on EU exports of apples and pears to the US. Consultations with the aim of implementing the "inspection at port of arrival" option resumed in 1996. A draft protocol for a "Schedule of Conditions" concerning participation in an "experiment" for the export of apples and pears from the EU to the US without phytosanitary pre-clearance by the US in the Member State of production, has been submitted to the US. However, the consultations have not yet been conclusive.

Pathogen free regions

Under US Regulations (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III, §319-56-2) the import of fruit and vegetables from an EU Member State, in which the relevant pathogen is known to occur, is not only prohibited from the infested area of that Member State, but also from the pathogen-free areas thereof. This creates undue obstacles to exports from pathogen-free regions within the EU.

An example is the prohibition of imports of tomatoes from Brittany because of the presence of the Mediterranean Fruit Fly in the Mediterranean regions of France. Although Brittany is ecologically isolated from the infested regions of France, and the French authorities carry out the necessary surveillance to avoid dissemination of the pest, imports into the US of ripe tomatoes from Brittany are not allowed by the US authorities. The EU considers these measures to be excessive; they discriminate Brittany against other pathogen-free areas in the Community, which is not justifiable on phytosanitary grounds, having regard to the conditions of the internal market within the Community. In July 1998 USDA announced that imports of tomatoes from a number of countries, including France, would be allowed. Specific conditions were attached to the import of pink and red tomatoes from France to take account of the risks associated with the Mediterranean fruit fly.

Another undue obstacle is the restriction, in the case of approved citrus consignments, of the ports of landing to those on the North Atlantic shores. This requirement leads to unnecessary costs of land transport into the southern and western parts of the USA. If the products were pre-cleared in the Member State of production, and moreover subject to cold-treatment during transport, there is no phytosanitary justification for the port restriction.

Potted plants

The provisions on standards and certification of plants established in growing media (Code of Federal Regulations of 1996, Title 7, Subtitle B, Ch. III, §319-37-8) were revised and effective on 13 January 1995 to permit the import into the US of four plant genera in sterile growing media. This has reduced the obstacles encountered by EU exports of potted plants to the US.

The new rule contains some requirements that are difficult for exporters to fulfil. For example, it is impossible to satisfy certain obligations because some of the species or genera involved have a growth cycle that is shorter than the waiting period required by USDA before export can take place.

It is noted that APHIS (Animal and Plant Health Inspection Services) has recently re-opened and extended the comment period on a proposal to allow the importation of Rhododendron (Azalea) established in growing media from Europe, originally published in the Federal Register of 7 September 1993. This was the result of the completion of consultations on Rhododendron in conformity with section 7 of the Endangered Species Act, which revealed that import from Europe is not likely to adversely affect endangered or threatened species or their habitants. In April 1998 USDA published a proposal to allow the importation of Rhododendron in established growing media.

Almost all sorts of plants are permitted imported, and almost all sorts of growing media (except soil) are permitted imported. However, when the permitted plants are in permitted growth media the import is not permitted, unless a special Pest Risk Assessment has been performed by APIS/USDA. Twenty years ago EU producers asked APHIS to make the PRA for 60 sorts. So far they have made 5 assessments, in all cases resulting in approval. This extremely long delay is not acceptable. APHIS agrees, but regrets not to have the staff to speed it up. The same office has thousands of applications for approval from all over the world for flowers and fruits and vegetables for import and export. Export approvals have priority.

The sixth assessment of plants from the EU list for Schlumbergera (X-mas cactus) has just been approved by APHIS. However, since cacti are considered endangered species, the Fish and Wildlife Service must give final approval, although

Schlumbergera is among the approved sorts of plants and already imported in big quantities from the EU as seedlings not in a growing media. It may take years to get the final approval, if ever from the Fish and Wildlife Service."

Hardy nursery stocks

The mandatory requirement for a two-year post-entry quarantine on an importer's premises for hardy nursery stock is considered by the EU to be excessive. Its main purpose is believed to be the detection of latent infections by organisms of quarantine concern. Although this measure may be justifiable in the case of new or developing trade in specific commodities, the EU considers this not to be the case, if the measure is required for long-term trade on a permanent basis. This requirement should be examined in consultations with the US.

BSE

The US introduced rules in 1997 on the import of ruminant animals and products thereof from all European countries based on concerns about Bovine Spongiform Encephalopathy (BSE).

The US requirements are not scientifically based, do not follow the OIE Code, and discriminate in targeting European countries. The US does not make any distinction between countries where the incidence of BSE is high or low (the latter being countries with occasional cases). The US action blocked all EU ruminant exports, pending examination by the US of data submitted. The EU has raised its concerns at this excessive action both bilaterally and in the Committee on Sanitary and Phytosanitary Measures in Geneva.

Goats

Quite apart from the BSE restrictions, the US also imposes animal health restrictions on the import of goats on the grounds of the risk of scrapie in sheep. These restrictions are not justified because of the widespread presence of scrapie in the US sheep population.

Recognition of the Community

The EU has a comprehensive set of veterinary legislation completed under the Single Market programme, and apart from certain specific restrictions based on the relevant disease status, there is free movement of animals within the Community. Nevertheless, the US continues to treat the Community on an individual Member State basis for the majority of issues, thus excluding several products of many Member States from access to the US market. The entry into force on 1 August 1999 of the EU-US Veterinary Agreement should improve the situation.

Regionalisation

The EU operates a policy of regionalisation, where restrictions are applied in zones affected by certain animal diseases, with free movement of animals and products outside the affected zones. An animal or product fit for movement is then considered fit for export. The principle of regionalisation as an effective means of controlling animal disease has now been incorporated into the US Tariff Act 1930 by the NAFTA and is part of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. However, US import administrative rules concerning Foot and Mouth Disease, Rinderpest and other relevant diseases have still not been amended to reflect this change in legislation, despite a clear commitment in the EU-US Agreement on Application of the Third Country Meat Directive, reached in 1992. The US published a proposed rule on "Importation of Animals and Animal Products" covering only ruminants and swine on 18 April 1996. The EU made substantive critical comments, and has continued to press for the US to recognise the EU's application of regionalisation in the context of an EU-US Veterinary Agreement. An agreement was negotiated on a technical level on 30 April 1997. The US, in a letter dated 24 February 1998, has committed itself to accept the EU's regionalisation decisions upon implementation of the EU-US Veterinary Agreement.

Non-recognition of disease-free status

Other restrictions on live animals relate to the non-recognition by the US of the EU's freedom from certain diseases. The US published a proposed rule on the recognition of the disease status of certain member States for certain diseases on 14 November 1997 and confirmed it as a final rule in 1998. The US further committed itself in March 1998 to publish a further proposed rule covering the outstanding recognitions of Member States and diseases, notably as regards classical swine fever. The Proposed Rule - published in the Federal Register on 25 June 1999 -_together with the additional written assurances allowed the EU-US Veterinary Equivalency Agreement to be signed on 20 July 1999.

Non-comminglement

Non-comminglement means that establishments exporting meat or meat products to the US may not handle meat or meat products from countries that are not recognised as being free from certain diseases of concern to the US, and that there is no mixing of meat or meat products destined for the US with meat or meat products from such countries. The EU-US Agreement on Application of the Third Country Meat Directive provides for an establishment to handle both categories of meat or meat products provided that there is a separation in time between handling them. So far, however, the US has not been willing to apply this provision of the agreement. The EU-US Veterinary Agreement includes specific provisions for the application of non-comminglement.

Uncooked meats

Imports into the US of uncooked meat products (sausage, ham and bacon) have been subject to a long-standing prohibition. Following repeated approaches by the EU, US import regulations were modified to permit the import of Parma ham, Serrano hams, Iberian hams, Iberian pork shoulders and Iberian pork loins. However, the US still applies a prohibition on other types of uncooked meat products (e.g San Daniele ham, German sausage, Ardennes ham) despite the fact that meat products may come from disease free regions and that the processing involved should render any risk negligible.

Egg products

The import of egg products is allowed only under very strict conditions, in particular, the requirement for continuous inspection of the production process. A system of periodic inspection of the production process would be acceptable from a human health point of view, but continuous inspection is superfluous and expensive, and has a negative effect on prices and competitiveness.

Canned food

The import of "Low Acid Canned Food" such as fisheries products or dairy products is subject to a detailed prior approval system and makes no provision for accepting such products produced under "equivalent" hygiene conditions.

4.6 Government Procurement

Federal Buy America legislation

The Buy America Act (BAA), initially inacted in 1933, is the core domestic preference statute governing US procurement. It covers a number of discriminatory measures, generally termed Buy America restrictions, which apply to government-funded purchases. These take several forms: some prohibit public sector bodies from purchasing goods and services from foreign sources; some establish local content requirements, while others still extend preferential price terms to domestic suppliers. Buy America restrictions therefore not only directly reduce the opportunities for EU exports, but also discourage US bidders from using European products or services. The domestic industry, through the court system and legislative lobbying, ensures that Buy American preferences are vigorously enforced and maintained.

The restrictions apply to government supply and construction contracts, and require Federal agencies to procure only US mined or produced unprocessed goods, and only manufactured goods with at least a 50% local content. Executive Order 10582 of 1954, as amended, expands the scope of the Buy America Act in order to allow procuring entities to set aside procurement for small businesses and firms in labour surplus areas, and to reject foreign bids either for national interest or national security reasons. As a result of the GATT (subsequently WTO) Government Procurement Agreement (GPA), waivers from many Buy America provisions have been foreseen for GPA Parties (inter alia, through the 1979 Trade Agreements Act), including for the EU. However, the actual implementation of these waivers may in some cases produce legal uncertainty and this may act as a barrier. In addition to that, some persistent Buy America provisions continue to limit access to the US procurement market in a significant way.

One of the most obvious areas of Buy America is federal aid administered by the Department of Transportation (DOT) under several different acts, including the Highway Administration Act, the Urban Mass Transit Act, and the Airports Improvements Act. In accordance with these acts, the DOT provides aid to the State and local governments for various transportation-related procurements. The State or local government at some level must match that money. Specifically, the Federal government may fund 40% to 80% of the project (depending on the nature of the grant), while the State or local government must fund the remaining share. All purchases of goods and services related to these projects must meet various Buy American provisions, usually domestic content requirements of 60% and, failing that, a price penalty of up to 25%. The European Commission estimates Buy America to affect about US$ 25 billion of contracts in FY2001, particularly mass transport and airport improvement. These are precisely the sectors where EU business is very competitive. This figure is expected to increase to about US$ 35 billion by 2005, taking account of budget growth forecasts. These restrictions will negatively impact European suppliers of products including iron and steel and transport equipment.

National security issues

The Department of Defense (DoD) also has significant procurement expenditures that exclude foreign suppliers of goods or services. The DoD is the largest public procurement agency within the US government spending many tens of billions of dollars annually on supplies and other requirements. Except as required by the Defense Supplement to the Federal Acquisitions Regulation (DFARS), contracting officers must apply Buy American Act requirements to supply contracts exceeding the US$ 2,500 micro-purchase ceiling and to service contracts that involve finishing of supplies when the supply portion exceeds the micro-purchase ceiling. In March 1999, the Director of Defense Procurement reminded US defence agencies and military departments to ensure that their contracting officers comply with requirements of the BAA, as an audit report had revealed that some contracts had been awarded to foreign firms in contravention of the relevant provisions.

In addition, many procurements fall under “national security” exceptions to open procurement obligations. Although the concept of national security can be invoked under Article XXIII of the GPA to limit national treatment in the defence sector for foreign suppliers, the use of national security considerations by the US has led in practice to a disproportionate reduction in the scope of DoD supplies covered by the GPA. While the US denies abusing the WTO national security exemption, it has indicated a readiness, in the context of the implementation of the GPA, to disseminate more guidance to US procurement officials for identifying which procurements are covered by the Agreement and which by national security exemptions. It has also expressed its intention to ensure clear and consistent identification of national security procurements, and improve the coherence of the US Federal Supply Classification System with the international Harmonised System. Together, these intentions mark a first small step towards more acceptable practices.

There has been a trend towards making DoD's other domestic preferences, apart from the BAA preferences, less restrictive – by expanding the preference to qualifying countries. These are countries that maintain reciprocal memoranda of understanding (MoU) with the US. Currently, eleven EU Member States are qualifying countries. Still, an amendment to the fiscal year 1998 Defense Appropriations bill, which would have given the Secretary of Defense blanket authority to waive the domestic preference for American specialty metals, stainless steel, flatware, clothing, or naval components, was substantially diluted by Congress. The compromise language only permits the Secretary of Defense to waive the restriction on a case by case basis under certain circumstances on a limited number of products, rendering the application of a waiver much more difficult. In addition, a bill introduced in the Senate (S. 384) in February 1999 by Commerce Committee Chairman McCain (R-AZ) to authorise the Secretary of Defense to waive certain domestic source or content requirements in the procurement of items procured for the DoD failed to make any progress. In introducing his bill, Senator McCain commented: "Mr. President, it is my sincere hope that this legislation will end once and for all the anti-competitive, anti-free trade practices that encumber our government, the military, and US industry."

Management and operation of research and development facilities under the Department of Energy, NASA, the National Science Foundation, or the DoD are often entrusted to private companies and universities under "management and operating (M&O) contracts." Their M&O contracts do not follow the full and open competition procedures required under the Federal Acquisitions Regulations. Very few M&O contracts have been subject to competitive procedures and often the procurements done by these companies themselves follow Buy America requirements. The US has excluded M&O contracts from its offer in the GPA. More widely, the government has instituted a number of R&D programmes in recent years in which there is a strong preference for US participants. Examples are the Renewable Energy Export Technology Transfer Program and the High Speed Ground Transportation Development Program. Most of these programmes also require Buy American compliance with respect to all materials furnished pursuant to the project.

There are numerous other marginal expenditures. While not exhaustive, the following examples of Buy America statutory programmes should be mentioned: the Balance of Payments Program; the Merchant Marine Act of 1936; the Hazardous Materials Transportation Authorization Act of 1994; the Amtrak Authorization Act; Grants for Construction of Water Treatment Works; National and Community Service Act; National Science Foundation Act of 1988 (as amended); and the President's National Space Policy Directive of 1990 and 1994. The latter precluded US Government agencies from using foreign launch services (except, in the case of NASA, in collaborative projects not involving an exchange of funds). This policy was subject to undefined exceptions – a possibility that was never, or almost never, used.

In October 1998, President Clinton signed the Commercial Space Act of 1998. This law, on the one hand, calls on Federal agencies to buy space launch services – rather than launch vehicles; on the other hand, it requires these services to be procured from "US commercial providers", subject to certain exceptions, for instance for international collaborative efforts related to science and technology. It thus legislates the Buy America policy contained until then in the President's National Space Policy but opens the door for NASA to enter into collaborative projects with foreign space agencies even if they involve the disbursement of funds. It remains to be seen how the US Administration will interpret the notion of "US commercial provider". The US justified these restrictions, which initially applied to the launching of military satellites, on national security grounds, but is now also imposed on satellites for civilian use. These measures are part of a set of co-ordinated actions to strengthen the US launch industry and are clearly detrimental to European launch service providers. European launch operators remain in any case effectively barred from competing for most US government launch contracts, which account for approximately 50 % of the US satellite market.

Other indirect barriers

In addition to the direct legal barriers mentioned above, the complexity of procurement rules may in some cases act as a effective indirect barrier. Indeed, suppliers based in countries that are parties of the WTO/GPA are generally not directly excluded from the scope of Buy America and other restrictive regulations. Instead, legislation generally foresees the granting of waivers as regards these suppliers. However, the actual implementation of these waivers may in some cases produce a considerable degree of legal uncertainty.

Sub-federal selective purchasing laws

At a sub-federal level, selective purchasing laws (whereby the access of companies to contracts is severely or completely curtailed as a result of the companies' business links with particular third countries) continue to cause great concern. Such laws have been adopted by the Commonwealth of Massachusetts (in the case of Burma) and more than 20 cities and local authorities, and are under consideration by a number of other sub-federal authorities. The Massachusetts legislation has been considered by the Supreme Court and found unconstitutional on the grounds of division of powers between States and the federal authorities. Whilst this removes this particular obstacle, the wider issue of principle vis-à-vis the EU, is left un-addressed.

The EU strongly objects to these attempts to regulate the behaviour of EU companies that are acting in full compliance with EU and Member States' Laws.

The Commission will continue to monitor the situation in other sub-federal jurisdictions.

State Buy America legislation and restrictions

Buy America or "buy local" legislation is also rife at State level. More than half of all US States and a large number of localities do apply some "Buy Local" restrictions in one form or another. In some cases, the procurement of particular products are subject to such restrictions, such as steel, coal, printing and cars. Affirmative action schemes favouring small business or particular types of business (e.g. minority-owned) are also applied extensively in a large number of States. Although 39 of the 50 States are covered by the bilateral agreement of 1994 (and 90% of total procurement by value at State level), there are still gaps in its scope and, in some cases, concerns about its actual degree of implementation. Among the 11 states that have not been bound in the US GPA offer, some maintain very substantial local preferences, which have a negative impact on EU and other foreign suppliers. This is the case of Alaska, New Mexico, South Carolina and, to a lesser extent, Ohio and Virginia. . In the case of New Jersey, State legislation also provides that for the construction of public works projects financed by State funds, the materials used (e.g. cement) must be of domestic origin. Even in the GPA-bound states various exemptions (i.e;for purchases of cars, coal, printing and steel and for set aside) seriously limit the procurement opportunities open to foreigners. Besides, all procurements by States and localities that benefit from particular types of federal funding (e.g. in mass transit and highway projects) are subject to BAA.

Set-aside for small businesses

The Federal Government actively seeks to promote the growth of small businesses in numerous ways. It provides loans and grants, develops programmes to encourage bids from small business, and sets aside certain procurement contracts for small business. The "set-asides" are specifically exempted from application of the GPA. Small business set-asides represent a substantial proportion of federal procurement money – many tens of billions in expenditures or around 30% of all federal procurement dollars.

The relevant legislation is the Small Business Act of 1953, as amended, which requires executive agencies to place a fair proportion of their purchases with small businesses. This is achieved through two different types of set-aside schemes: one where US Federal government contracts are set-aside, regardless of the size of the contractor, in the event that there is a reasonable expectation of bids from two or more eligible US small or minority businesses; the other where all contracts below a certain threshold (currently US$ 2,500 to US$ 100,000) are set aside for US small or minority businesses -- contracts are only released for competitive bidding in the event that two or more eligible bidders cannot be identified. In this context, small businesses are defined as businesses located in the US which make a significant contribution to the domestic economy (through payment of taxes and/or use of US products, materials, and/or labour) and are not dominant. The standard size criteria for eligibility as a small business for goods producing industries is 500 employees or fewer. However, for some industries (pulp, paper boxes, packaging; glass containers; transformers, switchgear and apparatus; relays and industrial controls; miscellaneous communications equipment; search, detection, navigation guidance systems and instruments) the employee limit is 750 and for some others (chemicals and allied products; tyres and inner tubes; flat glass; gypsum products; steel and steel products; computers, computer storage devices, terminals; motors and generators; telephone and telegraph apparatus) it is 1000. For services industries, depending on the sector, firms with total annual revenues of less than US$ 2.5 million to 17 million are considered to be small businesses.

In 1999, the US Small Business Administration launched another programme - HUBZone - which will provide contracting benefits to small businesses located in "historically under-utilised business zones". The first goal of the programme is to channel at least one percent of overall federal procurement to HUBZone small businesses, which at current federal spending levels equates to about $2 billion. By the year 2003 that goal rises to three percent, or about $6 billion.

Currently, the notion of fair proportion means that the government-wide goal for participation by small businesses shall be established at no less than 20% of the total value of all prime contract awards for each fiscal year. Under the normal bid procedures, there is a 12% preference for small businesses in bid evaluation for civilian agencies (instead of the standard 6%). In the case of the DoD, the standard 50% preference applies to all US businesses offering a US product.

An important number of States also operate particularly proactive small businesses and minority set-aside policies. It is estimated that in States like Texas such policies effectively exclude foreign firms from around 20% of procurement opportunities. In

Kentucky as much as 70% is set aside for small businesses. The active promotion of small businesses is a common concern for the EU and the US. The EU is, however, concerned that the US "set-aside" measures and their exemption from the GPA are favouring US industry and restricting the ability of foreign (EU and other) companies doing business in the US.

Berry Amendment

The concept of "national security" was originally used in the 1941 Defense Appropriation Act to restrict procurement by the DoD to US sourcing. Now known as the "Berry Amendment", its scope has been extended to secure protection for a wide range of products only tangentially related to national security concerns -- for example, the 1992 General Accounting Office ruling that the purchase of fuel cells for helicopters is subject to the Berry Amendment fabric provisions, and the withdrawal of a contract to supply oil containment booms to the US Navy because of the same textile restrictions. A recent audit report by the Defense Department's Office of Inspector General concluded that for certain DoD procurements during fiscal years 1996 and 1997, about half of the solicitations and contracts examined had not incorporated or enforced the relevant domestic sourcing requirements. In response, DoD's procurement director has taken steps to ensure that contracts at or above the simplified acquisition threshold (presently US$ 100,000) are domestically sourced. To comply with the Buy America provisions, contracting officers must generally add 50 percent to the price of nonqualifying country end products when evaluating offers with nonqualifying end products against offers with domestic end products. In September 1996 Congress adopted an amendment that extended the initial scope of the Berry Amendment to cover also all textile fibres and yarns used in the production of fabrics. The result of this extension is that Community fibres and yarns can no longer be used by US manufacturers for producing fabrics that they sell to the DoD.

Further DoD procurement restrictions are based on the National Security Act of 1947 and the Defense Production Act of 1950, which grant authority to impose restrictions on foreign supplies in order to preserve the domestic mobilisation base and the overall preparedness posture of the US.

At the same time, defence procurement from foreign companies is sometimes also impeded by Buy America restrictions on federally funded programmes.

MoU undermined

In practice, all NATO countries (except Iceland), all major non-NATO allies of the US (e.g. Australia, New Zealand) as well as Sweden, Finland and Austria have signed Memorandums of Understanding (MoUs) with the US allowing for a waiver of the corresponding restrictions. However, these MoUs are subject to US laws and regulations, and consequently, other restrictions can be imposed annually by Congress through the appropriations process. For example, US legislation allows the Administration (DoD and USTR) to rescind a waiver if it determines that a particular ally discriminates against US products. In addition, Congress is unilaterally overriding the MoU by imposing ad hoc Buy America requirements during the annual budget process (e.g. in the case of anchor and mooring chains). There are also indications that US procurement officers disregard the exemption of Buy America restrictions for MoU countries (e.g. in the case of fuel-cells, ball and roller bearings and steel forging items).

In fact, the barriers to defence trade with the US result from a complex set of rules and practices aiming at imposing "domestic sources restrictions" in US defence acquisition. A partial identification of all these barriers is provided in a July 1998 report of the US General Accounting Office that was established to justify these "domestic sources restrictions". The following examples illustrate the large variety of obstacles facing EU exporters to US:

- Specific requirements to produce goods on US soil. This can take many forms, for example as part of the DoD programme approval procedure, a requirement exists that any major defence item must be produced on US soil, so that EU companies can only do business by selling the licences to manufacture (e.g. Harrier Vertical Take-Off and Landing Jet). In relation to large calibre cannons, there is legislation in Congress requiring that they be produced in a particular US plant. Such requirements can also be buried in the annual Defense Appropriations bill – for example, in relation to small arms, DoD is required to justify the need to buy offshore.

- There is no grant-back given for changes made to products by the licensee (a common element of licensing systems in the area of non-defence goods, as the original owner then benefits from changes made).

- Foreign Comparative Tests (FCT) are tests carried out to assess the best product for goods not produced in the US. Funds to carry out such tests have been reduced in 1999, although the defence budget itself had been increased. Also, experience shows that, where an FCT pinpoints a successful product, DoD seeks a licence to produce that product in the US rather than entering into a direct supply contract with the offshore producer. The effect of this practice is that EU suppliers look for a US production partner early in the process.

- Barriers arising from the use of the Foreign Military Sales Regulation (FMSR). The FMSR introduces maximum foreign content threshold requirements for products exported with FMS support. This means that US prime contractors willing to seek FMS support are reluctant to design foreign content into their products. Instead, they prefer replacing any foreign content by US production under licence (e.g. armoured vehicles were obtained under licence from Austria and then sold on to Kuwait through the FMS system – this took sales to third countries away from European companies).

- Technical data / Technology export control requirements. Non-nationals cannot take their own foreign companies' technical data out of the US (even if only showing around for sales purposes) unless the US company is granted a licence to export that data – and consequently rights over the data.

- US subsidiaries. One way of circumventing the US-soil production requirements is to set up a subsidiary in the US. However, such subsidiaries need to obtain both security clearance and authorisation to operate. A precondition for obtaining this is that the overseas parent company must relinquish management control of the subsidiary (US Security Manual). These so-called "Chinese walls" are quite systematically established. Well known examples are within Allison (part of Rolls-Royce) and Tracor (part of BAE Systems).

- Lack of access to bidders conferences / security clearance considerations. Foreign nationals rarely have access to bidder conferences and other pre-contract award procedures, because they are not granted the required security clearances at that stage of the procurement process.

- Congressional approval of the defence budget. The defence budget is approved line-by-line and Congress regularly strikes out lines, including procurement programmes. The effect is that defence contractors lobby Members for support for individual programmes, offering inducements in return – sometimes ensuring that production capability will be located in Members' districts. This represents a kind of “regional juste retour” built into the budget approval process. As an example, the company developing a particular missile programme ensured that 49 States benefited from that particular programme, thereby ensuring that programme's survival in the budget.

Bearings

Congress has imposed a Buy America requirement on the procurement of ball and roller bearings since 1988, most recently to the end of the year 2000. In May 1996, the Federation of European Bearings Manufacturers’ Association (FEBMA) made a submission to DoD, in opposition to the restriction. The 1997 DoD Authorization Act contains the so-called “McCain Amendment” authorising DoD to waive Buy America requirements that would impede the reciprocal procurement of defence items under the MOU. The EU and 21 NATO countries asked for the effective implementation of the McCain Amendment and the termination of discrimination vis-à-vis imports from countries with which DoD has signed defence cooperation agreements, thus supporting FEBMA’s position. The DoD’s implementing interim rule was published on 24 June 1997 and included bearings. However, the waiver applicable to bearings may be of limited value since it does not apply to procurements made with funds subject to Buy American requirements under the Defense Appropriations Acts.

Iron, Steel and Non-Ferrous Metals

The main problem for the steel sector is the imposition of local content requirements or the preference given in works and other government procurement contracts for bids that include locally produced steel. This practice is notably common at the sub-federal level. Many States (such as Connecticut, Louisiana, Maine, Michigan, Illinois, Maryland, New York, Pennsylvania, Rhode Island and West Virginia) have such requirements that also apply to private contractors and subcontractors.

Telecom Equipment

Sanctions

As a result of the failure to liberalise purchases of telecom equipment, the US decided in 1993 to impose sanctions against the EU and certain Member States under Title VII of the Omnibus Trade and Competitiveness Act of 1988. The sanctions bar EU suppliers from bidding, inter alia, for US Federal government contracts that are below the threshold values of the WTO Agreement on Government Procurement. The EU responded with counter-sanctions (Regulation 1461/93) that also bar US bidders from applying for contracts awarded by central government agencies below the threshold values. Following the bilateral Marrakech procurement agreement of April 1994, which liberalised around US$ 100 billion of procurement opportunities on both sides, the EU considers that the sanctions are an unnecessary impediment to the bilateral relationship. Following the liberalisation of the EU telecoms sector, the US Administration has started to investigate the possibility to mutually lift the sanctions and counter-sanctions.

EC Actions in the context of the WTO Agreement on Government Procurement (GPA)

Many of the problems experienced by EU suppliers in acceding procurement opportunities in the US could be solved by an increase of the coverage of the GPA and by the elimination of the exceptions introduced in the US GPA offer. Thus, apart from other initiatives, the EC considers that the current review of the GPA offers a good opportunity for the improvement of the situation.

4.7 Trade Defense Instruments

1916 Antidumping Act

The US maintains in force its 1916 Antidumping Act, which prohibits the import and sale of products "at a price substantially less than the actual market value in the principal markets of the country of their production." A Trade Barriers Regulation procedure on the US Anti-Dumping Act of 1916 was initiated on 25 February 1997 further to a complaint by Eurofer (European Steel Industry). The investigations conducted by the Commission confirmed that the US authorities' failure to repeal the 1916 Act is in several respects not in conformity with the obligations of the US under the WTO Agreement, the GATT 1994 and the WTO Anti-Dumping Agreement. Infringements relate notably to the type of remedies available, the lack of procedural rules and of standing requirements, the definition and qualification of the injury concept, the criteria for the calculation of the normal value, and the absence of the requirement to introduce products into the commerce of another country as a prerequisite for dumping to take place.

In addition to a still pending Court action in Utah, there are indications that further Court actions under the 1916 Act could be brought against several steel importers of EU products, thus transforming the 1916 Act into an alternative to the conventional and WTO-compatible anti-dumping rules for use by the US industry.

Despite numerous offers made by the Commission services, the US authorities did not appear willing to reach an amicable settlement. Under these circumstances, a Commission decision to request formal WTO consultations was published in the Official Journal on 28 April 1998. At the occasion of the consultations of 29 July 1998, the Commission reiterated its concern to resolve the case on an amicable basis. Meanwhile, in November 1998, a new Court action under the 1916 Act, involving steel imports from Russia and Japan by subsidiaries of EU companies, was initiated before the Ohio District Court (in which part of the defendants made an out-of-court settlement with the plaintiffs in early 1999). On 7 March 2000 a US printing press manufacturer filed a complaint under the 1916 Act against German (and Japanese) producers of large newspaper printing presses in US District Court for the Northern District of Iowa.

A panel was established on 1 February 1999. The panel report was circulated on 31 March 2000. The panel's conclusions were that the 1916 Act violates Articles VI:1 and VI:2 of GATT 1994, several provisions of the Anti-Dumping Agreement and Article XVI:4 of the Agreement Establishing the WTO and recommends that the DSB request the US to bring the 1916 Act into conformity with its obligations under the WTO Agreement. The US appealed this ruling, together with a ruling on a similar case brought by Japan.

Safeguard measure on steel wire rod

On 1 March 2000 the US introduced a tariff quota of 1.58 million net tons on imports of steel wire rod. The quota will remain in place for three years. Imports exceeding this quota will be subject to an additional import duty of 10 % in the first year, 7.5 % in the second year and 5 % in the third year. The quota level will increase by 2% annually.

Safeguard measure on welded line pipe

On the same day, the US introduced a safeguard measure on imports of welded line pipe. The measure consists of an additional 19 % import duty, which will remain in place for three years, but which will not apply to the first 9,000 net tons of line pipe originating in each exporting country. The duty will be reduced to 15% in the second year and 11% in the third year. This measure has also entered into force on 1 March 2000.

The Commission intends now to react to the US measures in both the steel wire rod and the welded line pipe cases by suspending equivalent concessions under Article 8 of the WTO Safeguard Agreement (SA). This Article affords exporting countries the right to obtain trade compensation. Since the US failed to offer any trade compensation, the EC is entitled to suspend equivalent concession. Such a suspension would not have any immediate effect in practice, given that Article 8(3) SA stipulates that the right of suspension shall not be exercised for the first three years that a WTO compatible safeguard measure is in effect (that is why the US measures have been limited to such duration). However, it would send a clear signal to the US that the EC is ready to fully use its rights under the SA and that the suspension would immediately take effect should the US decide to extend the measures and/or should the Dispute Settlement Body (DSB) find that the US measures do not conform to the SA.

Sunset reviews on countervailing duties

In May 2000, the Commission raised with the DoC and the USTR the issue of sunset reviews of countervailing duty measures against EC Member States. The Commission cited several cases where DoC had found subsidisation to have fallen below the "de-minimis" level of 1% set out in the Agreement on Subsidies and Countervailing Measures (SCM) Agreement, but had nevertheless determined that subsidisation would continue at the rate found in the original investigation, and had thus recommended the extension of the countervailing duties. The Commission warned the US authorities that WTO dispute may be requested if measures were definitively extended on the basis of such findings.

Countervailing duties on pasta from Italy

On 24 July 1996, the DoC imposed antidumping and countervailing duties on pasta from Italy. The latter contain a component designed to countervail EU export refunds granted on cereals used in the manufacturing of pasta. This measure is in breach of item 8 of the US-EC Pasta Settlement of 1987.

Agriculture and Fisheries

Safeguards on imports of wheat gluten

On 1 June 1998 the US imposed safeguard measures in the form of a quota on imports of wheat gluten from *inter alia* the EU. The EU considers that these measures are in violation of Articles 2, 4, 5, 8 and 12 of the WTO Agreement on Safeguards, Article 4.2 of the Agreement on Agriculture and Articles I and XIX of GATT 1994. Additionally, the measures impair a significant trade interest, the EU being the major supplier of the product and its trade being cut by 40% from 1997 levels. In two rounds of bilateral consultations the US did not provide an adequate justification of the measures. On 14 August 1998 the EU withdrew "substantially equivalent" concessions by imposing a tariff quota on imports of corn gluten feed from the US effective 1 June 2001 or upon the declaration of a WTO panel that the US measures are not in compliance with WTO rules. This action was based on Article 8 of the WTO Agreement on Safeguards and duly notified to the WTO on 29 July 1998. On 4 May 1999 the EU requested WTO dispute settlement consultations. As these consultations proved inconclusive, the EU requested a WTO panel that was established on 26 July 1999. A ruling is expected in July 2000.

The protectionist nature of the US safeguard measure is likely to be compounded by modifications to the management rules of the quotas.

Iron, Steel and Non-Ferrous Metals

Countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the UK

In June 1998, the EU initiated a WTO dispute settlement procedure against the DoC countervailing methodology with respect to privatisation of the European company British Steel. The Commission holds that the US practice of countervailing pre-privatisation subsidies without showing whether the privatised company has obtained a benefit constitutes a violation of the ASCM. Consultations under the DSU on this issue were held with the US in Geneva on 29 July 1998. A panel to examine the issue was established at the DSB meeting of 17 February 1999. On 23 December 1999 the panel found in favour of the EC and condemned the US methodology. These findings have been confirmed by the WTO Appellate Body on 10 May 2000. The Commission expects the US to take into account the findings of the WTO panel in ongoing CVD investigations involving EU companies where similar issues are at stake.

4.8 Export Restrictions

Export controls

A comprehensive system of export controls for dual-use items was established under the Export Administration Act (EAA) of 1979 and the US Export Administration Regulations (EAR) to prevent trade to unauthorised destinations. This system, among other things, requires companies incorporated and operating in EU Member States to comply with US re-export controls. This includes compliance with US prohibitions on re-exports for reasons of US national security and foreign policy. The extraterritorial nature of these controls has repeatedly been criticised by the EU and its Member States, given the fact that the latter are active members of all international export control regimes: the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime and the Wassenaar Arrangement (see Iran Non-Proliferation Act 2000 in chapter 2, providing for US sanctions on third countries lawful exports to Iran, by expanding the scope of export controls beyond those multilaterally agreed upon).

Serious concerns have also been raised by the 1988 US Trade Act’s amendment to Section II of the EAA providing for sanctions against foreign companies which have violated their own countries’ national export controls, if such violations are determined by the President to have had a detrimental effect on US national security. The possible sanctions consist of a prohibition of contracting or procurement by US entities and the banning of imports of all products manufactured by the foreign violator. These sanctions would appear to be contrary to the GPA.

Satellites

Since 1999, the jurisdiction for export controls on commercial communications satellites as well as parts and components and related technical data has been transferred by Congress (National Defense Authorisation Act) from the Commerce Department to the State Department, thus subjecting them to tighter controls. Relevant goods or technologies, previously listed as dual-use goods, have been added to the US munitions list. Exceptions were provided by Congress calling for an expeditious treatment of export licence requests for NATO and major non-NATO allies. However in practice this exception was not implemented with the US Administration retaining a wide latitude for imposing additional export control requirements, also on NATO countries, as it sees fit for reasons of national security. These strict controls, including monitoring of technical exchanges with EU firms may delay satellite launches and impair European launch providers from serving the US commercial market (US Government launches are reserved for American providers according to the Commercial Space Act adopted in 1998). They also negatively impact manufacturers of satellites and components which rely on US parts and impair the ability of EU firms to reply to US bids for tender. Moreover, it also impacts negatively on European insurers of launches of US satellites whose access to the technical data required to assess the insurance risks has been hampered. A provision in the FY2000 Consolidated Appropriations bill signed into law in November 1999 attempted to clarify the so-called "NATO/non-NATO major allies exception." Pursuant to this provision, a new regulatory regime for export licenses to US allies was announced in May 2000 and is to come into effect in July 2000. It remains to be seen whether this regime adequately addresses the difficulties caused by the transfer of jurisdiction.

Encryption

With the digital age, the need has evolved for improved protection in a number of areas, including personal data, trade secrets and databases, against unauthorised use. A strong example where this need is obvious is electronic commerce. In March 1997, the OECD Council adopted a Recommendation on Guidelines for Cryptography Policy setting out principles to guide countries in formulating policies and legislation relating to the use of cryptography.

At present, both the EU and the US operate export control regimes to limit the cross-border movement of the strongest encryption products. On 30 December 1996, new US export control regulations were published that transferred the licensing of commercial encryption products from the Department of State to the Department of Commerce and mandating key recovery until 31 December 1998. A new interim final rule was published on 14 January 2000. The rule amends the Export Administration Regulations (EAR) to allow the export and re-export of any encryption commodity or software to individuals, commercial firms and other non-governmental end users in all destinations; it also allows exports and re-exports of retail encryption commodities to all end users in all destinations; post export reporting requirements are streamlined and the changes of the Wassenaar Arrangements are incorporated (Cryptography Note). The restrictions on terrorist supporting states (Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria), their nationals and other sanctioned entities are not affected by this rule. This new rule could pose potential problems such as a different treatment for use by government bodies, Internet and telecommunications service providers for which existing or new restrictions apply. The notion of "US subsidiaries" in Section 740.17. could create a competitive disadvantage, especially for the development of new products as European firms based in the US will have their products "technically reviewed" and as a "supplementary information" provision is required for foreign companies to apply for Encryption Licensing Arrangements (ELAs) in order to obtain treatment equivalent to that extended to foreign subsidiaries of US parent companies. The nearly generalised introduction of the technical review of encryption products above a certain key length in advance of sale, creates a difficulty for the European industry for cases of re-export. The newly created rules applicable to retail encryption commodities and software, in particular the eligibility criteria (functionality, sales volume, distribution methods, ability to modify products and the level of support by the supplier), will probably be subject to divergent interpretations. The effect of the Cryptography Note, as introduced in the Wassenaar Arrangement, is reduced by the US authorities through the introduction of two new requirements: "crypto functionality should not be modified or customised" and "the items cannot be network infrastructure products such as high end routers or switches designed for large volume communications". The latter items still need to be licensed.

The practical effects of this remain to be seen. A combination of the continuing constraints on the export of strong encryption products and on the interoperability of systems employing such technology inhibits not only trade in encryption products but, more importantly, the effective growth of electronic commerce. Moreover, many modern encryption techniques are patented and licenses may be required to allow sales of European products in the US. Thus, significant barriers to international trade in encryption products without key recovery continue to exist.

4.9 Subsidies

Transparency in the area of subsidies is an obligation of the WTO Agreement on Subsidies and Countervailing Measures. Up to 1998, the US only notified the WTO of a limited number of Federal programmes, many of which were relatively small, and refused to notify its many State-level subsidies. However, following pressure from the EU, in the form of detailed questions and a counter-notification under Article 25.10 of the Agreement, the US finally began to notify certain state-level subsidies in its new and full notification of 1998.

This notification was reviewed in the WTO Subsidies Committee in May 1999. The EU still remains concerned by the lack of information on US State-level subsidies, particularly large, ad-hoc investment incentives. The reporting of Federal subsidies has improved, although there are still gaps as regards certain sectors, notably aerospace. The US undertook to include non-notified subsidies, including those identified by the EU, in the next update notification. This update, which should have been provided in 1999, has now been promised for September 2000.

Aircraft

The large civil aircraft (LCA) sector is generally subject to the WTO rules on subsidies (1979 GATT Agreement on Trade in Civil Aircraft), but more specific multilateral rules are required to restrict all forms of government support and intervention for aircraft products. The EU regrets that, at the end of the Uruguay Round negotiations, the US blocked the adoption of a new Civil Aircraft Agreement supported by all other negotiating parties. Although negotiations have continued since, no progress has been made.

LCA Agreement

Bilaterally, the EU and the US started negotiations for the limitation of government subsidies to the LCA sector in the late 1980s. Such negotiations were concluded in 1992 with the signature of the EC-US Agreement on Trade in Large Civil Aircraft (O.J. L 301 of 17 October 1992) which focuses on the limitation of both direct and indirect government support. The Agreement suffers from an important divergence between the US and the EU in the way to interpret the indirect support discipline and, on the European side, there is the concern that its implementation has created an increasing imbalance of obligations. In fact, despite the very high level of US funding for its civil aircraft industry, which since 1992 has not abated, US representatives have continued to argue that only a negligible fraction should be considered as a benefit for US industry. The EU is surprised that the US did not organise in 1999 the consultations, which they were supposed to hold further to the

Bilateral Agreement.

Support from the NASA aeronautics budget

In particular, in the face of very large public funding for NASA aeronautics R&D budgets, the US has so far denied the existence of benefits to the US LCA industry. For instance, a conservative estimate of NASA's aeronautics budget for 1998 amounts to US$ 1.13 billion. According to estimates carried out for the EU, about 70% of NASA's aeronautics spending can be classified as support to the US LCA industry. In FY 1998, the DoD spent about US$ 5 billion on R&D for the development of aircraft and related equipment. This translates into benefits to the civil aircraft manufacturers between US$ 698 million and 1,17 billion. Finally, the Federal Aviation Administration (FAA) has an annual aeronautics budget for research and development that exceeds US$ 2 billion. One of the FAA's stated objectives is "to foster US civil aeronautics". However, the US declared that only a negligible proportion of this spending has turned out to be an identifiable (indirect) support to the US LCA industry. It should be added that Boeing benefited in 1999 from a prohibited export subsidy (FSC) of $230 million.

According to EU estimates, for the FY 1998, US LCA manufacturers received indirect support in the range of 5.2% to 7.4% of their commercial turnover. This is well above the 3% limit set by the 1992 Bilateral Agreement.

Supersonic aircraft programme

Another area of great concern to the EU industry is the NASA programme for High Speed Civil Transport (HSCT) for the future development of a new supersonic aircraft to succeed Concorde. Although the programme is rumoured to be winding down, this has yet to be formally confirmed and benefits from the work already done will flow into the subsonic aircraft sector in any event. The US aircraft and aero-engine industry have been closely working with NASA on this project which has been funded at the level of more than US$ 200 million per year. US industry set the initial research parameters, it defined NASA's research priorities with respect to HSCT, it was awarded NASA HSCT contracts to perform the needed research and it is protected from sharing valuable data and results with others.

Active support from the Administration and Congress

Finally, it must be underlined that the US Administration has taken a very active stance in favour of the domestic aircraft industry not only through R&D government financing (subsidies), but also by means of high-level political leverage with third countries' airlines (inducement). In 1999, the EU has raised the issue of blatant inducement in Israel at the GATT Committee on Trade in Civil Aircraft.

The Federal Aviation Administration has also been used to support Boeing. In January 2000, it decided to modify the operating rules for twin-engine aircraft (ETOPS), helping the competitive position of the B-777 vis-à-vis the A-340. In April 2000, the Secretary of Transportation was granted discretionary authority not to grant landing & take-off rights ("slots") at four US airports for airlines which did not fly Boeing with the passage of the AIR-21 FAA reauthorisation legislation. This constitutes discrimination violating three international agreements (the EC-US 1992 Bilateral, the 1979 GATT Agreement on Civil Aircraft and the 1994 GATT).

<u>Shipbuilding</u>

OECD Shipbuilding Agreement

The signing of the OECD Shipbuilding Agreement in December 1994, which is meant to eliminate aids in the shipbuilding sector, was a major achievement and was expected to have a significant impact on US and all other signatories subsidy programmes and unfair practices in the shipbuilding sector. The Agreement aims to eliminate all direct and indirect support and to combat injurious pricing practices.

Standstill provisions on existing subsidy levels and on new measures of support before the entry into force of the Agreement had been accepted within the Final Act of the Agreement.

In December 1995 the EC, South Korea and Norway deposited their instruments of ratification for the Agreement. Japan did so in June 1996. The failure of the US to ratify it is a matter of great concern. Opposition in the Congress originating from the naval industry did not allow the US to ratify it. Despite several attempts during the past years, no bill concerning the implementing legislation has moved in Congress in the last few years. The EU continues to request the ratification of the OECD Agreement by the US and to monitor the impact of the existing subsidy programmes. There are no real prospects of US ratification in 2000, but US industry's concerns about unfair competition by Korean yards could relaunch the process in the future.

Subsidies

From 1980 until 1994 US shipbuilders did not succeed in building for export. The domestic market for the Navy and the protective Jones Act (which reserves the construction of the vessels used for coastwise traffic to US shipbuilders) provides shipyards with orders. Production was less than 100,000 gross tonnes (gt) in 1993 while the available capacity was 250,000 gt. However, during the period 1994-1998, the deliveries grew up to 641,000 gt. The US shipbuilding industry now represents 2% of the world market and the potential capacity, taking into account re-conversion of military installations, is estimated at 1.1 million gt. The Merchant Marine Act of 1936, as amended, provides for various shipbuilding subsidies and tax deferments for projects meeting domestic-built requirements. These are provided via the Operating Differential Subsidy (ODS), the Capital Constructions Fund (CCF) and the Construction Reserve Fund (CRF). These measures will have to be modified by the US Congress before the entry into force of the Shipbuilding Agreement.

On 5 December 1997, Vice President Gore announced that up to US$ 80 million in federal funds, part of a US$ 400 million aid package, would be available to complete the revitalisation of the Philadelphia naval shipyards, to be managed by the Kvaerner group. State and local authorities would finance the remainder of this package. In addition to the federal funds for training, US$ 320 million of sub-federal subsidies granted to the yard would be inconsistent with the US commitments not to introduce new measures of support or to increase the level of the existing measures.

In addition the US administration introduced a new programme, the so-called "Capability Preservation Agreement Scheme" included in H.R. 1119, signed into law on 18 November 1997 (PL 105-85). This scheme allows qualified shipyards to claim for reimbursement on their US Navy shipbuilding contracts for certain costs attributable to work on their commercial shipbuilding.

Loan guarantees

The Merchant Marine Act also established under Title XI, the Guaranteed Loan Program (formerly known as the Federal Ship Financing Guarantee Program) to assist in the development of the US merchant marine by guaranteeing construction loans and mortgages on US flag vessels built in the US. In 1993 the guarantee programme was extended to cover vessels for export. An attempt to also extend Title XI coverage to all Jones Act vessels could come under consideration in the Senate. As of 1 October 1997, approved applications for construction guarantees involved 11 companies and 40 vessels, with 17 applications pending. During fiscal year 1997, Congressional authority for the Title XI program had a cap of US$ 12 billion, with US$ 11.15 billion allocated to the Maritime Administration (MARAD) and US$ 850 million authorised to guarantee the financing of fishing vessels and fisheries facilities by the National Oceanic and Atmospheric Administration. Title XI guarantees for eligible export vessels are limited to US$ 3.0 billion. As of 1 October 1997 Title XI guarantees in force aggregated approximately US$ 2.6 billion, covering approximately 1933 vessels and 116 individual ship owners. In 1998 US$ 734 million in Title XI loan guarantees were approved by MARAD for the shipbuilding sector, covering 70 vessels and barges. Up to April 1999 US$ 1.5 billion has already been approved, of which US$ 1.1 billion is available for the construction of 2 cruise ships at Ingalls Shipyard, a category which has not been built in the US for 30 years. The OECD implementing legislation will have to provide for the amendment of these loan guarantees in order to put them in conformity with the rules of the 1994 Understanding on export credits for ships, which would have entered into force together with the OECD agreement. The US industry would like to retain this scheme which has helped to revitalise the sector.

Agriculture and Fisheries

Export Enhancement Program

The US operates a range of programmes designed to subsidise and/or promote exports of US agricultural products. The US has continued to maintain an aggressive export policy for agricultural products. The recent Farm Bill adopted by Congress has confirmed this approach.

The Export Enhancement Program (EEP) allows US exporters to apply for a cash subsidy designed to make US products competitive with subsidised exports from other countries. EEP has been capped at US$ 350 million in fiscal year 1996, but applies to products exported to over 70 countries. Currently operating in the same manner as EEP is the Dairy Export Incentive Program (DEIP) which is also used for market development purposes. Although EEP funds have not been utilised in recent years due to high world market prices, the recent decline in commodity prices has increased pressure from Congress for their full use.

The Market Access Program (formerly the Market Promotion Program) offers a share of costs for promotion campaigns for agricultural products (the majority being high value and value added) in selected export markets. The Farm Bill provides US$ 90 million annually for fiscal years 1996-2002.

The Export Credit Guarantee Program offers US government guarantees of short-term GSM-102 (6 months - 3 years) and medium-term GSM-103 (3-10 years) private bank loans at commercial interest rates. It is targeted at countries which need guarantees to secure financing but show a reasonable ability to repay. The program includes a specific list of commodities per country allocation. It has recently become the main export policy tool of USDA, with annual allocations exceeding US$ 5 billion and declared annual subsidy levels of over US$ 400 million. The program has a default rate of over 10% historically, and it is characterised by uncertainty (and lack of transparency) with respect to the implicit subsidy component stemming from rescheduling of payments. To date no agreement on rules governing export credit guarantees in agriculture (under Article 10.2 of the UR Agreement on Agriculture) has yet been reached due to US objections. The Emerging Markets Program is funded under the Farm Bill for approximately US$ 1 billion during fiscal years 1996-2002 with US$ 10 million annually for technical assistance.

5. INVESTMENT RELATED MEASURES

5.1 Direct Foreign Investment Limitations

National security considerations: the Exon-Florio provisions

Section 5021 of the 1988 Trade Act, the so-called Exon-Florio amendment, authorises the President to investigate the effects on US national security of any merger, acquisition or take-over which could result in foreign control of legal persons engaged in interstate commerce. This screening is carried out by the Treasury-chaired Committee on Foreign Investment in the US (CFIUS). The length of time taken by the screening process and the legal costs involved can act as a deterrent to foreign investment. Moreover, should the President decide that any such transactions threaten national security – which is widely interpreted -- he can take action to suspend or prohibit these transactions. This could include the forced divestment of assets. There are no provisions for judicial review or for compensation in the case of divestment. Since being introduced, the scope of Exon-Florio has been further enlarged:

- Since 1992, an Exon-Florio investigation must be made if a foreign government owned entity engages in any merger, acquisition or take-over which gives it control of the company. Further provisions contain a declaration of policy aimed at discouraging acquisitions by and the award of certain contracts to such entities;

- The 1993 Defense Authorization Act requires a report by the President to Congress on the results of each CFIUS investigation and by including, among other factors to be considered, “the potential effect of the proposed or pending transaction on US international technological leadership in areas affecting US national security” -- again blurring the line between industrial and national security policy.

The Exon-Florio provisions thus inhibit the efforts of OECD members to improve the free flow of foreign investment and could conflict with the principles of the OECD Code of Liberalisation of Capital Movements and the National Treatment Instruments, although the US has notified reservations under the instruments for Exon-Florio.

Uncertainties about implementation

While the EU understands the wish of the US to take all necessary steps to safeguard its national security, there is continued concern that the scope of application may be carried beyond what is necessary to protect essential security interests. In this context, the EU has drawn attention to the lack of a definition of national security and the uncertainty as to which transactions are notifiable. Although the US Treasury’s implementing regulations, which were published in November 1991, did provide some additional guidance on certain issues, many uncertainties remain. Coupled with the fear of potential forced divestiture, many if not most, foreign investors have felt obliged to give prior notification of their proposed investments. In effect a very significant number of EU firms’ acquisitions in the US are subject to pre-screening.

Foreign ownership restrictions

With regard to foreign ownership, the US has informed the OECD of a number of additional restrictions that it justifies "partly or wholly" on the grounds of national security. Foreign investment is restricted in coastal and domestic shipping under the Jones Act and the US Outer Continental Shelf Lands Act, which includes fishing, dredging, salvaging or supply transport from a point in the US to an offshore drilling rig or platform on the Continental Shelf. Foreign investors must form a US subsidiary for exploitation of deep-water ports and for fishing in the US Exclusive Economic Zone (Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987). Under the American Fisheries Act of 1998, fishing vessel owning entities must be at least 75% owned and controlled by US citizens in order to document a vessel with a fishery endorsement. Licences for cable landings are only granted to applicants in partnership with US entities (Submarine Cable Landing Licence Act of 1921).

Under the Federal Power Act, any construction, operation or maintenance of facilities for the development, transmission and utilisation of power on land and water over which the federal government has control are to be licensed by the Federal Energy Regulatory Commission. Such licenses can only be granted to US citizens and to corporations organised under US law. The same applies under the Geothermal Steam Act to leases for the development of geothermal steam and associated resources on lands administered by the Secretary of the Interior or the Department of Agriculture. Regarding the operation, transfer, receipt, manufacture, production, acquisition and import or export of facilities which produce or use nuclear materials, the Nuclear Energy Act requires that a licence be issued but the licence cannot be granted to a foreign individual or a foreign-controlled corporation, even if there is incorporation under US law.

Conditional National Treatment

The principle of National Treatment -- that foreign direct investment should not be treated less favourably than domestic enterprises in like circumstances -- is one of the pillars of the liberalisation in the world economy and a well established legal standard in bilateral treaties and multilateral agreements. In OECD member states as well as worldwide, there has been a trend to remove barriers to the entry of foreign investment and to extend the application of national treatment by gradually removing existing restrictions. However, in the US, as in other countries, some long-established exceptions to this principle still exist thus giving rise to instances of Conditional National Treatment (CNT).

CNT generally relates to the treatment of foreign-owned firms that is less favourable than that of domestic firms. The conditioning of investment may take the form of:

Reciprocity

Specific reciprocity requirements: the investment is allowed only to the extent that "comparable" or "equivalent" opportunities are available to US firms in the home country of the investor. In some cases, such requirements may not even be related to the sector in which the foreign company wants to be economically active in the US ("cross-sectoral reciprocity").

Performance requirements

Performance requirements: relating either to the contribution of the foreign controlled company's activities to the US economy and employment, or to the realisation of specified parameters of production (volume, local content).

Public Subsidies

The EU has become increasingly concerned over recent years about US legislation taking the form of tests on whether a company, legally established in the US but whose ownership is foreign, meets certain conditions and requirements. CNT language is most notable in the area of science and technology and concerns the granting of Federal subsidies for research and development, or other advantages, to

US-incorporated affiliates of foreign companies.

Examples of conditional national treatment can be found in the American Technology Pre-eminence Act of 1991 that authorises the Advanced Technology Program, an industry-led, cost-shared R&D programme, designed to develop high risk technologies that the private sector is unlikely to pursue without government support, the Energy Policy Act of 1992 that authorises Federal programmes and joint ventures between industry and government laboratories in energy-related R&D, the National Co-operative Production Act of 1993, which extends the favourable antitrust treatment applying to joint R&D ventures, to joint manufacturing ventures and the Advanced Lithography Program which deals with research on semiconductor materials and processes.

Although US subsidiaries of European firms have been able to participate in US programmes, the fact remains that satisfying the eligibility conditions can be a more cumbersome process for foreign-owned companies.

5.2 Tax Discrimination

Cumbersome and discriminatory reporting requirements

The information reporting requirements of the US Tax Code as applied to certain foreign-owned corporations mean that domestic and foreign companies are treated differently. These rules apply to foreign branches and to any corporation that has at least one 25% foreign shareholder. They require the maintenance, or the creation, of books and records relating to transactions with related parties. The documents must be stored at a place specified by the US tax authorities and an annual statement filed containing information about dealings with related parties. There are stiff penalties for non-compliance with the various provisions. These requirements are onerous. Although their purpose, the prevention of tax avoidance and evasion, is reasonable, they are burdensome and add to the complexity for foreign-owned corporations of doing business in the US.

"Earnings stripping" provisions

The so-called "earnings stripping" provisions in Internal Revenue Code 163j limit the tax deductibility of interest payments made to "related parties" which are not subject to US tax, and of interest payments on loans guaranteed by such related parties. In practice, most "related parties" affected will be foreign corporations.

Internationally agreed approach overlooked

The provisions are designed to prevent foreign companies from avoiding tax by financing a US subsidiary with a disproportionately high amount of debt as compared with equity, with the result that profits are paid out of the US in the form of deductible interest payments rather than as dividends out of taxed income. This objective is reasonable and in line with internationally agreed tax policy. However, the US rules for calculating the ceiling in any year on the amount of admissible interest uses a formula, the results of which can be inconsistent with the internationally accepted arm's-length principle. If, ultimately, this leads to the disallowance of relief for the interest payable, it could have discriminatory consequences because a tax treaty partner would not be obliged to make a corresponding adjustment to taxable profits in the other country. The provisions relating to loans guaranteed by related parties could also disallow the interest on a number of ordinary commercial arrangements with US banks and provide a disincentive from raising loans with them.

State unitary income taxation: arbitrary calculations

Certain US States (Alaska, Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Rhode Island and West Virginia) and the District of Columbia assess State corporate income tax for foreign-owned corporations on the basis of an arbitrarily calculated proportion of their total worldwide profits. This proportion is calculated in such a way that a company may have to pay tax on income arising outside the State, giving rise to double taxation.

World-wide unitary taxation

"World-wide" unitary taxation is inconsistent with bilateral tax treaties concluded by the US at the Federal level. A company may also face heavy compliance costs in providing details of its worldwide operations. International attention has mainly focused on California, which from 1986 has allowed companies to elect for "water's edge" unitary taxation instead. Under this method, companies are taxed on the basis of a share of their total US (rather than worldwide) income. The 1994 US Supreme Court ruling that California's former worldwide unitary tax was constitutional was not encouraging. The EU and its Member States remain concerned about unitary regimes and will keep a watch on possible developments.

Foreign Sales Corporations

US legislation authorising so-called Foreign Sales Corporations (FSCs) (26 USC sections 921-27) provides that, under specific conditions, certain income earned by a foreign subsidiary of a US corporation will not be subject to US tax. The statute's presumption as to income allocation is questionable and gives rise to an objectionable tax benefit accruing to US firms. The purpose of the favourable tax treatment has been to encourage the export of US manufactured goods. The FSC is general legislation, applicable to all industrial and agricultural sectors and was recently expanded to cover the software sector.

Subsidies, which are contingent upon, export performance or upon the use of domestic over imported goods are strictly prohibited under the WTO. The FSC scheme applies exclusively to the export of goods and these goods must have more than 50% of their market value of US origin. Therefore, the FSC scheme provides a prohibited subsidy within the meaning of Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM).

FSC tax exemptions cannot be justified by the aim to avoid double-taxation for US companies established abroad. FSCs are typically established in tax havens where no income tax is paid at all. For instance, in 1996, 91% of all FSCs were incorporated in the US Virgin Islands, Guam and Barbados.

The EU also considers that the FSC scheme is an export subsidy within the meaning of Article 1 of the Agreement on Agriculture. On 24 February 2000, the WTO Appellate Body ruled in favour of the EU, as it considered that FSC exemptions amount to a prohibited export subsidy under the ASCM as well as the Agreement on Agriculture. The US is obliged to withdraw the WTO-incompatible subsidy by 1 October 2000 at the latest. Proposals submitted by the US authorities in May 2000 did not remove the export contingency aspect of the current FSC scheme. A new proposal is currently under consideration by Congress.

Aircraft

In terms of its economic impact, Boeing declared in its 1999 financial statements that FSC tax benefits amounted to US$ 230 million. This accounts for about 10% of Boeing's net earnings for the same year (US$ 2.31 billion). In 1998, Boeing saved US$ 130 million in taxes as a result of FSC on net earnings of US$ 1.12 billion. In terms of market value, it has been estimated that improved earnings due to FSC subsidies translate into advantages of US$ 1 to 2 billion for Boeing’s market capitalisation, allowing it recourse to relatively cheaper capital. The FSC system therefore grants a considerable competitive advantage to the US aircraft manufacturers to the detriment of their competitors.

6. INTELLECTUAL PROPERTY RIGHTS

6.1 Copyright and related areas

Moral rights

Despite the unequivocal obligation contained in Article 6bis of the Berne Convention to which the US acceded in 1989 to make "moral rights" available for authors, the US has never introduced such rights and has repeatedly announced that it has no intention to do so in the future. It is clear that while US authors fully benefit from moral rights in the EU, the converse is not true, which leads to an imbalance of benefits from Berne Convention membership to the detriment of the European side. It is noted that the US has ratified and implemented the WIPO (World Intellectual Property Organisation) Copyright Treaty and the WIPO Performances and Phonograms Treaty. Adherence to these Treaties by the US requires legislation on moral rights at least for performers.

Cross-border licensing of music works

Following a complaint under the Trade Barriers Regulation concerning obstacles to the licensing of music works in the US, an examination procedure was initiated on 11 June 1997. The complaint was lodged by the Irish Music Rights Organisation (IMRO) and unanimously supported by the Groupement Européen des Sociétés d'Auteurs et de Compositeurs (GESAC). It related to Section 110(5) of the 1976 US Copyright Act that provides for an exemption to the author's exclusive rights to authorise the communication of their works to the public ("homestyle exemption"). Concretely, Section 110(5) permits the playing of "homestyle" radios and televisions in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.

The investigation report, which was submitted to the TBR Committee on 3 February 1998, confirms that Section 110(5) violates the US's obligations under Article 11bis(1) of the Berne Convention for the Protection of Literary and Artistic Works and consequently those under Article 9(1) of the Agreement on Trade related Aspects of Intellectual Property Rights (TRIPs) Agreement. The report also shows that this practice has caused a serious deprivation of income to EU right-holders, estimated at between US$ 3 and 6 million a year, representing between 10 and 20% of the annual amount of royalties obtained by EU authors for the public performance of their works in the US.

On the basis of these conclusions, the Commission invited the US to discuss the matter informally. However, the US did not show a willingness to find an amicable settlement that would be satisfactory for EU right-holders. In addition, on 6 October 1998 an amendment was approved by the Congress ("Fairness in Music Licensing Act") substantially widening the scope of the homestyle exemption. As a result, the effects on Community right-holders will be worsened. At the request of the EC and its Member States, at the Dispute Settlement Body (DSB) meeting of 25 May 1999, a Panel was established which met in November and December 1999.

On 5 May 2000, the panel issued its final report. The panel's main finding is that the most important of the two subparagraphs of Section 110(5) is in breach of the US' obligations under the TRIPs Agreement and therefore recommended that the Dispute

Settlement Body request the United States to bring subparagraph (B) of Section 110(5) into conformity with its obligations under the TRIPS Agreement. The report of the Panel was published on 15 June and will be considered for adoption by the DSB on 27 July. At the time of writing there is no indication as to whether the US will appeal or as to how it will implement the panel's recommendations.

6.2 Appellations of Origin and Geographical Indications

Inadequate protection of geographical indications of wines and designations of spirits

The amendment to the US trademark law (new subsection 2(a) of the Lanham Act) adopted for the purpose of implementing Articles 23.2 and 24.5 of the TRIPs Agreement creates grounds for refusal or cancellation of a trademark that consists of, or comprises, a geographical indication which, when used on - or in connection with – wines or spirits, identifies a place other than the origin of the good. It does not apply to indications that an applicant first used in connection with wines or spirits before the TRIPs Agreement entered into force. However, Art. 24.5 TRIPs allows continued use only of those trademarks used or registered in good faith before 1995 or before the geographical indication is protected in its country of origin. Thus, it will have to be closely followed whether the US comply with their TRIPs obligations, by ensuring that a trademark used or registered in bad faith in the US can no longer be maintained where it is identical with or similar to a geographical indication.

The European Commission and the US government have begun to negotiate a broad-ranging wine agreement, which would include improving the protection of geographical indications.

Incomplete BATF list of non-generic names

In April 1990 the Bureau of Alcohol, Tobacco and Firearms (BATF) published a list of examples of "Foreign Non-generic Names of Geographic Significance Used in the Designation of Wines." However, many EU appellations of origin and geographical indications do not figure on this list and the EU indicated to BATF that the list, as published, is not satisfactory since it does not ensure sufficient protection of EU wine denominations in the US. A petition to BATF to complete the list of EU protected distinctive indications was rejected on the grounds of lack of evidence that the names were known to the US consumer.

Semi-generic names

US regulations allow some EU geographical denominations of great reputation to be used by American wine producers to designate products of US origin. The most significant examples are Burgundy, Claret, Champagne, Chablis, Chianti, Malaga, Madeira, Moselle, Port, Rhine Wine (Hock), Sauterne, Haut Sauterne and Sherry. Despite the fact that in 1997 the D'Amato amendment codified US regulations on the use of semi-generic wine names in the US into Federal law, some progress was made in the context of the current bilateral negotiations between the US and the EU where the US took a conditional commitment to phase out semi-generic names. This commitment as well as all other areas of the protection of geographical indications is currently under discussion between the EU and the US.

Grape names

American producers also use some of the most prestigious European geographical indications as names of grape varieties. This abuse could often mislead consumers as to the true origin of the wines. Furthermore, the improper use of EU appellations of origin and geographical indications for wines places the respective EU products at a disadvantage on the US market.

Spirits

With regard to spirits, an agreement was approved by the EU in February 1994 for the mutual recognition of two US and six EU geographical indications and provides for future discussions on the possibilities of extending their mutual recognition. For the other EU designations, the US regulations provide a limited protection which does not prohibit their improper use: a geographical indication when qualified by BATF as "non-generic distinctive" may be used for spirits not originating in the place indicated but with a proviso such as "kind", "type", etc. or in conjunction with the true origin of the product. This is likely to constitute a violation of Article 23.1 of the TRIPs Agreement which expressly prevents use of a geographical indication for spirits not originating in the place indicated, even where the true origin of the product is indicated or accompanied by an expression such as "kind", "type", "style", "imitation" or the like.

6.3 Patents, trademarks and related areas

Measures affecting imported goods

Section 337 of the Tariff Act of 1930 provides remedies for holders of US intellectual property rights by keeping the imported goods which are infringing such rights out of the US ("exclusion order") or to have them removed from the US market once they have come into the country ("cease and desist order"). These procedures are carried out by the US International Trade Commission (ITC) and are not available against domestic products infringing US patents. Under the 1988 Omnibus Trade and Competitiveness Act, several modifications have been introduced to Section 337, such as the availability of remedies in relation to imported goods that infringe a US process patent. The GATT Panel Report which was adopted by the Contracting Parties in November 1989 came to the conclusion that Section 337 was inconsistent with GATT Article III:4. The provision in question accords to imported products alleged to infringe US patent rules treatment less favourable than that accorded to like products of the US. Some modifications have been made to Section 337 in the context of implementing the TRIPs Agreement; however, Section 337 - in its present form - does not eliminate the major GATT inconsistencies raised by the 1989 GATT Panel. As a result, Section 337 appears to continue to be in violation of Article III. 4. GATT and, since the entry into force of the WTO, of a number of provisions contained in the TRIPs Agreement.

In January 2000, the EC and its Member States requested WTO consultations with the US on Section 337 which were held in February 2000. During the consultations, the US maintained the view that Section 337 was in compliance with the provisions of the GATT and the WTO TRIPs Agreement.

In the US, advertising low price perfumes imitating famous European brands and thus benefiting from the well-known reputation of the European brands is not prohibited. This practice may violate Article 6bis Paris Convention (confusion) and/or Article 10bis Paris Convention (unfair competition), as incorporated into the TRIPS Agreement through its Article 2.1.

Government use

Under US law (28 US Code Section 1498) a patent owner may not enjoin or recover damages on the basis of his patent for infringements due to the manufacture or use of goods by or for the US government authorities. This practice is apparently extremely widespread in all government departments and it appears to be inconsistent with Article 31 of the TRIPs Agreement that introduces a requirement to inform promptly a right holder about government use of his patent.

First to file system

European companies are faced with indirect costs resulting from the 'first-to-invent' system for patent registrations in the US. The US patent system applies the principle of 'first-to-invent' which is only used in the US. The rest of the world follows the principle of 'first-to-file', fixing thereby a clearly defined moment when the priority right to a patent is established. The 'first-to-invent' principle creates several obstacles for EU and US companies trying to obtain a patent right in the US, namely because it has a considerable economic impact on the potential right holder. The issue has figured on top of the Transatlantic Business Dialogue agenda and the latter has recommended the adoption of the 'first-to-file' approach in the US.

Section 211 of the US Omnibus Appropriations Act

Congress adopted Section 211 of the Omnibus Appropriations Act in October 1998. It prohibits, under certain conditions, the registration or renewal of a trademark which is identical or similar to a trademark previously owned by a confiscated Cuban entity and sets forth that no US Court shall recognise or enforce any assertion of such rights.

In the view of the Commission and the Member States, Section 211 violates several provisions of the TRIPs Agreement, notably on national treatment and most-favoured-nation treatment, the protection of trademarks and enforcement. Section 211 was already applied in a case involving a European company that was not able to defend its trademark rights before a US court as a consequence.

At the request of the EC and its Member States of July 1999, WTO consultations were held with the US on Section 211 in September and December 1999. These consultations, while clarifying the respective positions, did not lead to a satisfactory resolution. Therefore, in March 2000, the EC and its Member States decided to request the establishment of a WTO panel; such request was sent to the Chairman of the Dispute Settlement Body by letter dated 30 June. The request will be addressed by the WTO DSB on 27 July 2000.

Patentability of software and business methods

The patentability of software and methods in the US has been identified by many as a potential barrier to entry in markets.

7. SERVICES

7.1 Business Services

Professional Services

New GATS disciplines

Following the conclusion of the GATS negotiations in 1993, the access of professional service suppliers to the US has been improved since a number of nationality conditions and in-State residence requirements have been removed.

Problems at State level

However, despite the improvements contained in the schedule of specific commitments, access to the US market, where licensing of professional service suppliers is generally regulated at State level, remains unsatisfactory. This is mainly due to the lack of transparency in -- and divergence of -- access conditions at State level, as well as the frequent absence of a transparent regulatory regime for the operation of foreign professional service suppliers. In addition, the Buy America provision in Section 136 (1) of the Foreign Relations Authorisation Act for fiscal year 1990-91 gives US companies bidding for contracts to provide guard services for US embassies a 5% price preference.

Improving outlook?

Nonetheless, the situation should improve steadily under the GATS: the Working Party on Professional Services has agreed on disciplines applicable to accountancy services, and the new Working Party on Domestic Regulation will continue working on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade. In addition, negotiations on market access and on the further liberalisation of professional services will take place as part of the next round of trade liberalisation talks.

7.2 Communication Services

In spite of the GATS Basic Telecommunications Agreement concluded in 1997 and in force since February 1998, European and foreign-owned firms seeking access to the US market still face considerable barriers, particularly in the satellite services sector (e.g. lengthy proceedings, conditionality of market access, de facto reciprocity-based procedures) and the mobile services sector (e.g. investment restrictions and lack of access to frequencies for 3rd generation services). This situation is not in line with the market access policy advocated by the US, and provides a competitive advantage to the significant number of US companies that have already access to the European market in these fields.

US commitments under the WTO Basic

The negotiations on basic telecommunication services, held in the GATS framework under the auspices of the WTO, concluded successfully on 15 February 1997. At that time, 69 governments undertook legally binding commitments on access to their

Telecom Agreement

telecommunications services' market, thereby liberalising a global market for telecommunications services estimated to be worth approximately US$ 600 billion, i.e. over 90% of total global revenues for telecommunications services. The WTO Basic Telecom Agreement entered into force in February 1998.

The US undertook commitments on most telecommunications services (voice telephone, data, telex, telegraph, private leased circuit services; local, domestic, long-distance and international; using any kind of technology; etc.), but retained several restrictions. Foreign direct investment in common carrier radio licences is limited to 20% (indirect investment being allowed up to 100%). The US also kept a market access restriction on satellite-based services, namely the monopoly of Comsat to link up with Intelsat and Inmarsat (recent US legislation has removed Comsat monopoly, see below).

Late in the negotiation, the US took an exemption to the MFN principle for one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services. The EU reserved its right to challenge this exemption as it applies to services which are part of the audio-visual commitments undertaken by the US in 1994 as a result of the Uruguay Round.

In November 1995, in the run-up to the WTO negotiations on a Basic Telecoms Agreement, the US Federal Communications Commission (FCC) had adopted a rule on entry of foreign-affiliated carriers into the US market, adding a new factor to the Commission's public interest review for the purpose of granting waivers of Section 310 restrictions on foreign indirect investment. Specifically, the FCC introduced an "Effective Competitive Opportunity Test" (ECO-test). The FCC also issued in May 1996 a notice of proposed rulemaking (so-called DISCO-II) applying the ECO-test to foreign-licensed satellites. The EU submitted objections in both proceedings. On 25 November 1997, the FCC adopted two rulings (a general ruling on foreign participation in the US market, and a specific one on the satellite services market entitled DISCO-II) to implement the commitments of the US in the Basic Telecom Agreement. In these rulings the FCC replaced the ECO-test with a rebuttable presumption that entry by carriers from WTO countries and by satellites licensed by WTO countries is pro-competitive, but the FCC retained the unclear "public interest" criteria which can still be invoked to deny a licence to a foreign operator, such as "trade concerns", "foreign policy concerns" and "very high risk to competition". Although the FCC expressed its intention to only deny market access on this basis in exceptional circumstances -- which are not well defined -- the discretion retained by the FCC remains of concern to the EU and raises questions as to the compatibility of the FCC rules with the US WTO commitments.

Satellite Services

European satellite carriers have encountered in the past few years a number of problems to serve the US market[1]: proceedings by the FCC on spectrum allocation and licensing are not always carried out in an objective, transparent, timely and non-discriminatory manner. Notably, the following cases have been brought to the Commission's attention: New Skies Satellites N.V. [2], Inmarsat Ltd.[3] And Eutelsat[4].

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[1] Please note that throughout this paragraph, "a satellite operator applying for market access to the US" means in practice that one or more US earth station operators apply to the FCC for a license to link up with the satellite(s) of that operator. The FCC process entails the allocation of certain frequency bands and/or orbital slots.

[2] The Netherlands-based New Skies Satellites N.V. (the privatised Intelsat spin-off) was granted market access to the US in August 1999 to provide Fixed Satellite Services (excluding Direct to Home services) for a 3-year duration only (compared to the standard renewable 10-year term). The FCC considered that New Skies was not independent

These case show that proceedings by the FCC on spectrum allocation and licensing are not always carried out in an objective, transparent, timely and non-discriminatory manner, and raise concerns regarding their compatibility with the US WTO commitments.

In parallel to the individual cases above-mentioned, Congress considered for nearly two years legislation that seeks to promote a pro-competitive privatisation of Intelsat, Inmarsat, their successor and spin-off entities. Various bills sought to unilaterally impose the specific criteria and timetables for the privatisation of these entities.

The "Open-market Reorganisation for the Betterment of International Telecommunications Act" (ORBIT Act) was finally adopted by Congress and signed on March 17, 2000 by President Clinton. The final text represents an improvement compared to earlier versions (hopefully as a result of the démarches made by the EC and its Member States). It gives more time, for instance, to these entities to conduct IPOs and meet the Act's privatisation criteria, but it still imposes conditions on entry into the US market of Intelsat, Inmarsat and New Skies. It contains guidelines for

enough from Intelsat and that, therefore, unconditioned access to the US market could have triggered anti-competitive risks due to potential difficulties for US companies to obtain access to foreign markets from national regulatory authorities having a wish to protect New Skies. New Skies plans to make an Initial Public Offering (IPO) of shares as soon as market conditions permit and expects that the results of this IPO will satisfy the FCC (i.e., will result in a "substantial dilution" of Intelsat Signatories' ownership) and will entitle US licensees accessing New Skies' satellites to the standard 10-year earth station license. This case shows that the US regulation (DISCO II and its "competition criteria") is actually carried out in a manner that violates US commitments in the WTO (in practice, the FCC still applies a reciprocity mechanism similar to the "ECO-test" by linking market access in the US to market access for US operators in third countries).

[3] Inmarsat Ltd access to the US market is not yet assured, even though it has been privatised since April 1999 and is now a UK-based company. Therefore, Inmarsat access to the US market should no longer be restricted. The FCC has issued only Special Temporary Authorisations for earth station operators to link with Inmarsat satellites, at first on the expectation that a bill setting out criteria for the privatisation of Inmarsat would be passed by Congress. This bill was eventually passed in March 2000 (see below) and on 31 March 2000 the FCC extended by another 180 days the Special Temporary Authorisations pending FCC determination as to whether Inmarsat meets the conditions of the Act. This procrastination is inconsistent with the US commitments in the WTO, as the US is bound to grant unconditional market access to satellite companies based in WTO countries.

[4] Eutelsat (an Inter-Governmental Organisation based in France whose privatisation is planned for 2001) faced last year a competing claim by a US company, Loral Skynet, to use a specific orbital location to provide Fixed Satellite Service to and from the US, in spite of the priority rights it had acquired under the ITU process. Eutelsat and Loral finally came to an agreement in December 1999, as it became clear that the FCC would not allow US earth station operators to link up with Eutelsat's satellite at the disputed orbital location in the absence of a settlement with Loral Skynet. In particular, there is a concern that the FCC leveraged its regulatory clout to the advantage of Loral and brought Eutelsat to the negotiating table. Absent this, and given ITU rules of filing priority, Eutelsat would have had no incentive to engage into settlement discussions. Eutelsat's existing customers have now received FCC authorisation to link up with its satellite, and Eutelsat is now waiting for an FCC decision to allow future customers to automatically link up with its satellite. This case raises questions about the compatibility of US domestic procedures with the GATS provisions on Domestic Regulation.

[5] Mainly by calling on the US administration to achieve the bill's objectives in international fora, by requiring that the US administration oppose any application by these entities for additional orbital locations in the ITU and by requiring that the US administration ensure that the US remain the administration responsible for Intelsat notification to the ITU.

[6] Specifically, the bill requires the US administration to pursue a cost-based settlement policy for international telecommunications, and to oppose assignment by competitive bidding of orbital locations or spectrum for the provision of international or global satellite communications services.

the US administration to influence the privatisation process of these companies[5] and to use that privatisation process to pursue wider objectives[6]. President Clinton, on signing this bill into law, has stated that the "provisions of S. 376 could interfere with the President's constitutional authority to conduct the Nation's foreign affairs" and that he "will therefore construe these provisions as advisory". The Act also includes statutory privatisation criteria which the FCC must apply in order to determine whether to grant market access to these entities. The President also stated that the Administration would continue to advise the FCC (which is an independent agency) on matters concerning interpretation of and compliance with US WTO obligations.

However, there is serious concern in the EU that these criteria apply to no other competitor, foreign or domestic and could lead the FCC to limit these entities' access to the US market, and thereby reduce competition in the US market (contrary to the explicit intent of the Act to promote competition). In that respect, this Act violates the US WTO obligations and should it be used against EU operators interests, the EU reserves its rights to use arbitration procedures under the WTO.

Finally, the US keeps restrictions on the provision of one-way satellite transmission of Direct to Home (DTH), Direct Broadcast Satellite (DBS) and digital audio services, following the exemption to the MFN principle taken by the US at the very last moment of the GATS negotiations on basic telecoms services.

Mobile communications

Access of third generation mobile communication systems to the US market could be restricted due to lack of availability of frequencies in that country. This concern has arisen following the decision in the US to allocate to second generation systems the frequency bands which had been identified for third generation systems by the International Telecommunications Union (ITU) at its World Assembly Radiocommunications Conference in 1992. These frequency bands are generally available for third generation systems in European and in most of the other countries throughout the world, as these countries have followed the ITU recommendation of 1992. More clarification from the US side is thus required on how frequencies for third generation systems will be made available in this country, with a view to ensuring that the US market is open to European and foreign country operators which are potential new entrants in the market, as well as to providing the necessary regulatory certainty to companies interested in investing in these new technologies in that country.

Radio communications

Section 310 of the Communications Act of 1934 remains basically unchanged following the adoption of the new Communications Act of 1996. It contains restrictions on the holding and transfer of broadcast and common carrier radio communication licences: no broadcast or common carrier (or aeronautical en route or aeronautical fixed radio station licence) shall be granted to – or held by – foreign governments or their representatives, aliens, foreign corporations, or corporations of which more than 20% of the capital stock is owned or voted by an alien (25% if the ownership is indirect subject to public interest waiver). The one change brought about by the Communications Act of 1996 was to eliminate the restriction on foreign directors and officers.

This situation has not changed through the Basic Telecom Agreement, as limitations on direct foreign ownership of common carriers radio licences have been explicitly retained in the US offer.

To provide telecommunications services, operators typically need to integrate radio transmission stations, satellite earth stations and in some cases, microwave towers into their networks. Foreign-owned US operators face additional obstacles in obtaining the licensing of these various elements relative to US-owned firms.

Foreign investment

The US has undertaken commitments in the framework of the Basic Telecom Agreement to suppress restrictions to indirect investment from 1 January 1998. However, the US Administration holds the view that it is not necessary to adopt specific legislation to abolish such investment restrictions, since the FCC may waive these restrictions under the current law by invoking the "public interest." The US Administration and the FCC consider that this waiver provision is sufficient for the FCC not to apply section 310(b)(4) to WTO Members. This situation does not provide certainty to European operators.

The US Congress is considering legislation that would prevent participation in US telecommunications companies by publicly owned foreign companies. In particular, a bill was introduced on 27 June in the Senate by Senator Hollings and a provision of the appropriations bill for the Departments of Commerce, Justice and State was adopted on 18 July by the Senate Appropriations Committee, which would prevent transfer of telecommunications licenses to a company that is more than 25% owned by a foreign government or its representatives.

This would constitute a clear violation of the US commitments in the WTO on foreign investment and it would affect the interests of European companies which intend to invest in the US. The European Union reserves its right to take any appropriate course of action should such provisions become law, and would oppose any action, through legislation or otherwise, that would undermine these US WTO commitments.

Universal Service

The current universal service and access charge regimes in the US require further clarification, in particular with a view to ensuring that foreign consumers are not subsidising universal service obligations in the US.

Digital terrestrial television

The US Federal Communications Commission mandated in 1996 an exclusive standard for digital terrestrial television in the US, ATSC/8VSB. This decision has prevented the technology developed in Europe, DVB-T/COFDM, from entering into the US market. There are growing calls from market players in the US for multiple modulation standards to be allowed to enter into the US market, so as to allow broadcasters to choose the technology best suited for the innovative services and applications they want to offer their customers. If the FCC were to ignore market demand, it would be in contradiction with the calls for technological neutrality and market driven approaches that the US Government has been making in other communication fields.

Internet domain names and cybersquatting

In the context of violations of trade marks and famous marks which have been reported to us, the Commission welcomes the development of alternative dispute resolution (ADR) for the Internet DNS and has, together with the United States and other countries, supported the recommendations of WIPO for an administrative dispute resolution procedure and the implementation of the ICANN Uniform Dispute Resolution Policy.

In parallel to the adoption in August 1999 and the implementation in November 1999 by ICANN of the Uniform Dispute Resolution Policy (UDRP), the US enacted the Anticybersquatting Consumer Protection Act in November 1999. This Act which entitles the owner of a mark registered in the Patent and Trademark Office to file an *in rem* civil action against a domain name, in the case of a violation of the right of the owner of a mark by a domain name in the judicial district in which a domain name registrar or registry is located, also allows a plaintiff to elect to recover statutory damages between US$ 1,000 and US$ 100,000.

The Commission supports the view that a world-wide system based on the WIPO's recommendations would be beneficial to the whole Internet community and should be allowed to work through to some results and evaluation rather than being pre-empted by national legislation. Though a thorough analysis of the Anticybersquatting Consumer Protection Act has not been completed so far, the Commission has some reservations about the possible impact that it could have on the use of the UDRP as trademark owners may prefer to act under the US legislation rather than the UDRP.

The Commission is further concerned by the fact that other countries might enact further legislation, similar or divergent, creating a situation of "patchwork" legislation world-wide which could affect the uniform approach proposed under the WIPO and ICANN dispute resolution scheme, in particular at the stage where the WIPO system might be extended to address Famous Names and other categories of names dispute.

Therefore the Commission re-affirms its support to the UDRP that has been put in place by ICANN and WIPO and endorses the outcome of the international workshop on cybersquatting held in Australia on 31st January and 1st February, where it was agreed that WIPO would be requested to initiate a study and develop recommendations on further issues arising from abusive domain names registration in relation to the protection of personal and non-protected names within the domain name system.

Encryption

The Commission expressed concerns about the US regime, considering that a combination of the continuing constraints on the export of strong encryption products and on the interoperability of systems employing such technology inhibits not only trade in encryption products but, more importantly, the effective growth of electronic commerce. Moreover, many modern encryption techniques are patented and licenses may be required to allow sales of European products in the US. Thus, significant barriers to international trade in encryption products without key recovery continue to exist.

7.3 Financial Services

The US financial services sector has been traditionally characterised by industry and geographic fragmentation, but this situation has been changing over the last several years. The application of technology and new flexibility shown by federal regulators and upheld by courts has increasingly blurred traditional product distinctions. The pace of affiliations between banks and securities houses and the conduct of insurance activities by banks began picking up prior to the recent enactment of the Gramm-Leach-Bliley Act of 1999 ("GLBA"), and this important legislation has removed additional legal barriers. Implementation of interstate banking legislation passed in 1994 has largely removed the traditional impediments to interstate banking in the United States. Electronic commerce is also beginning to have an impact on the delivery of all kinds of financial products. As a consequence, it is expected that the US market will look very different in the early 21st century than it does now and that there will be increasing convergence between the US and EU financial sectors. In this dynamic environment, it is important that EU financial firms be given competitive opportunities comparable to those afforded US institutions as new laws are passed, regulations are adopted and the market evolves. In this regard, the European Commission is working to improve access of European financial institutions to US markets in a number of key sectors, including the new financial activities permitted under GLBA and reinsurance and other wholesale insurance markets.

WTO Financial Services negotiations

Financial services negotiations in the framework of the GATS are particularly important. GATS negotiations on financial services are being relaunched in Geneva this year and provide a forum to seek improved access of EU financial institutions to US and other markets. A permanent and MFN-based agreement entered into force in March 1999. All major trading partners of the EU, including the US, are part of this agreement, which provides a predictable and legally enforceable commitment, improved access of EU (and other countries') financial institutions to the US market, and non-discriminatory treatment of their operations.

<u>Banking</u>

Sectoral segmentation and access to new financial powers for financial holding companies

Product-related limitations on activities and affiliations are of great interest to EU firms. The Gramm-Leach-Bliley Act of 1999 removes many of the remaining restrictions in the financial sector. GLBA makes it possible for banks to affiliate with insurance companies, eliminates the remaining Glass-Steagall restrictions on affiliations between banks and securities firms and generally expands the scope of permissible financial activities. US bank holding companies and foreign banks that want to take advantage of the new powers must qualify as a financial holding company or "FHC." Restrictions that bar affiliations between commercial firms and banking institutions have not been removed and in some respects have been strengthened (viz., the elimination of the so-called exception for unitary thrift holding companies). However, in an attempt to compromise the interests of banks, insurance companies and securities firms, the legislation contains an important new exception that permits FHCs to make merchant banking investments. These consist of controlling investments by FHCs in commercial firms subject to restrictions on the ability of the FHC to engage in day-to-day control of the company and to time limits on the holding. The US financial services industry has objected to regulations issued by the Federal Reserve and the Treasury Department that impose aggregate limits and capital charges on merchant banking investments.

The statute establishes standards for domestic bank holding companies to qualify as FHCs and requires that the Federal Reserve Board adopt "comparable" standards for foreign banks taking into account the principles of national treatment and equality of competitive opportunity. In January, the Federal Reserve issued an Interim Rule that spells out the standards for both domestic bank holding companies and foreign banks. This rule is effective until it is replaced by a Final Rule, which is expected mid-late summer 2000. The Interim Rule itself has elicited comment from European banks and governmental authorities that it does not provide foreign banks with treatment comparable to that granted to domestic institutions. The European Commission has expressed serious concern about the Interim Rule in several exchanges with the Federal Reserve Board. It also undertook a diplomatic démarche vis-à-vis the State Department together with the Portuguese Presidency on behalf of all the Member States. The regulations are criticised for failing to provide foreign banks national treatment and equality of competitive opportunity, for being inconsistent with both the concept of consolidated supervision on a home country basis and the Basle Capital Accord and for raising significant extraterritorial issues. In particular, the Federal Reserve is imposing a leverage capital ratio on the foreign bank even though such requirements are not required by the Basle Committee or the home countries of European banks and in the past the Federal Reserve has concluded that leverage ratios are unnecessary for foreign banks.

Debanking problems

Prior to the Gramm-Leach-Bliley Act an EU firm could have been required to give up its banking license in the US as a result of, for example, a merger in Europe with an EU insurance company. These limitations were of particular concern to EU companies looking to exploit the new flexibility in the Single Market to develop integrated financial services operations. GLBA removes the need for European financial groups to give up banking or insurance operations in the US as the price of a merger taking place in Europe. However, concerns with the standards being applied to foreign banks to qualify as FHCs, initial indications that the Federal Reserve will limit the scope of new financial activities such as merchant banking, and uncertainties concerning the Board's supervisory authority over insurance companies by virtue of its role as "umbrella regulator" mean that for many diversified European groups "rebanking" in the United States may not be an attractive prospect.

Geographical segmentation and establishment issues

The long-standing geographical segmentation of the US financial services industry has been largely removed by the Interstate Banking and Branching Efficiency Act of 1994 (the Riegle-Neal Act). Interstate banking is now possible on a non-discriminatory basis through bank acquisition, consolidation (or merger) and, where state law permits, de novo branching. Gramm-Leach-Bliley contains a provision making it easier for foreign banks to upgrade an agency or limited branch office outside of the foreign bank's home state to a full service branch accepting wholesale deposits if permitted by state law and if the office meets certain age tests. Since 1991 EU banks have not been permitted to establish or acquire US branches the deposits of which are insured by the Federal Deposit Insurance Corporation other than through a US bank subsidiary.

<u>Insurance</u>

Links to banks

The US insurance market is the largest in the world, although its relative share of the world market has been constantly diminishing. As discussed above in the context of debanking, the Gramm-Leach-Bliley Act has removed the statutory obstacle to operate in the US market for EU insurance companies that are affiliated outside the US with a bank having a branch, agency or a commercial lending company or a bank subsidiary in the US.

Access issues under state law

A remaining impediment for EU insurance companies seeking to operate in the US market is the fragmentation of the market into 54 different jurisdictions, with different licensing, solvency and operating requirements. Each state has its own insurance regulatory structure and, by contrast to banking, federal law does not provide for the establishment of federally licensed or regulated insurance companies. However, interest in establishing a federal statutory structure for licensing and regulation of insurance is growing.

The US regulatory/supervisory structure is far behind that of the EU, and this entails heavy compliance costs for EU companies in each of the 54 jurisdictions. The National Association of Insurance Commissioners (NAIC) is making a tentative attempt to harmonise some basic regulatory requirements between the states, but this will be a long process. The NAIC's recommendations are not binding, so even if state insurance commissioners agree to some further harmonisation, implementation at state level cannot be guaranteed. Allied to the costs involved in dealing with this outdated regulatory structure, EU companies also face direct discrimination on a number of fronts. For example:

– not all states have "port of entry legislation". In other words, to underwrite risks in one state, an EU insurance company must first be licensed in another state before seeking a licence in the first state;

– some states require their insurers to buy reinsurance from state-licensed companies, before allowing reinsurance premiums to leave the state;

– those EU companies that specialise in the US$ 9 billion "surplus lines" market (large industrial, transport, or hard-to-place risks), such as Lloyd's and the Paris market have to be "white-listed" by the NAIC to operate on a cross-border basis in the US. In order to receive approval, companies have to, *inter alia*, name a US attorney and lodge a trust fund in a US bank of up to US$ 60 million. No credit is given for the fact that EU companies are effectively regulated in the EU or for situations where the retrocession takes place to US domestic insurers. Partly as a result of these rigid requirements, market share of Lloyd's on the surplus lines market has dropped from 20% to 14% over the last 10 years. Other non-US companies share of the market has also dropped from 12% to 9% over the same period.

However, there is a growing body of industry opinion in the US in favour of further liberalisation of their domestic market. This has led the NAIC to consider deregulation/harmonisation of state laws for commercial lines of insurance (large risks).

In the context of the Transatlantic Economic Partnership, the EU and the US are presently exploring possibilities for achieving (some form of) mutual recognition in this sector. The objective would be to facilitate cross-border underwriting of insurance by removing unnecessary obstacles and reducing red tape.

Independent of the regulatory framework, certain foreign insurers have also been concerned by several state laws to revoke licenses of their US insurance subsidiaries based on failure to cooperate with the Insurance Commission (IC) set up to pursue insurance claims of Holocaust victims. Faced with a growing number of class action lawsuits and legislation at the state level pertaining to insurance claims of Holocaust victims, in 1998 a number of EU insurance firms joined with Jewish and Holocaust survivor organisations and US insurance regulators to form an International Commission to pursue these questions in an expeditious and fair manner. The Memorandum of Understanding (MoU) establishing the IC provides that the insurance regulators would work to achieve exemptions from existing and pending state legislation for companies that sign the MoU and fully co-operate with the process and funding of the IC. Despite this provision and despite the progress made in the IC to establish a claims settlement process, sub-federal sanctions legislation which requires foreign insurance companies in the US to co-operate with state regulators' new investigative powers, and threatens them with suspension of operating licences, continues to pose difficulties to EU firms.

Securities

Establishment problems

EU securities firms may register as broker-dealers or investment advisers, and may in principle establish both in the form of branches or subsidiaries. However, the establishment of a branch in the US by a foreign securities firm to engage in broker-dealer activities, although legally possible, is in fact not practicable, since registration as a broker-dealer means that the foreign firm incorporated outside the US establishing the branch has to register and become itself subject to Securities and Exchange Commission (SEC) regulation. Foreign mutual funds have not been able to make public offerings in the US because the SEC's conditions make it impracticable for a foreign fund to register under the US Investment Company Act of 1940.

Reciprocity requirements

At the Federal level, the Primary Dealers Act (22 USC 5341) prohibits firms from countries that do not satisfy reciprocal national treatment requirements and which were not authorised before 31 July 1987 (with the exception of Canadian and Israeli firms) from becoming or continuing to act as primary dealers in US government bonds. The Federal Reserve Board has carried out examinations of four government securities markets in the EU (Germany, United Kingdom, France and the Netherlands) and concluded that US firms were generally granted national treatment in dealing in government securities in those Member States. The Primary Dealers Act is often cited as the first step by the US in the direction of conditional national treatment, although it is not a tool that has been utilised to exclude any European firm from the US market.

7.4 Transport Services

<u>*Air Transport Services*</u>

Computers reservation systems

Until recently, computer reservation systems (CRS) gave preference in the US to "on-line" services (connections with the same carrier) over "interline" services (connections with other carriers). This practice implicitly disadvantages all non-US carriers which, unlike their US competitors, have to rely on interline connections for traffic to and from US points other than their own gateways (behind gateway traffic). A degree of progress has been achieved with the publication of a Final Rule in December 1997 which will require each CRS to offer one display that lists flights without giving all on-line connections a preference over inter-line connections. However, it is not clear that non-stop flights will be shown first in the display.

Foreign ownership of air carriers

The Federal Aviation Act of 1958 prohibits foreign investors from taking more than a 49% stake in a US carrier and restricts the holding of voting stock to 25%. This latter limitation makes US rules on foreign ownership considerably more restrictive than relevant EU rules. Cross border investment is an important driving force behind liberalisation. Reducing foreign ownership restrictions would give better access for carriers to international capital, which in turn would contribute to growth, competitive effectiveness, and the promotion of competition and consumer benefits. In the past the US Administration has advocated liberalisation of foreign investment restrictions, but thus far no progress has been achieved in this area.

Hatch amendment

The Hatch Amendment, which was signed into law on 24 April 1996, requires the Federal Aviation Administration (FAA) to apply security measures to foreign carriers, identical to those already applied by the FAA to US airlines serving the same US airports. The FAA final rule, implementing the law, has yet not been issued. Whilst the EU supports efforts to improve aviation security, such legislation amounts to a breach of international agreements. Efforts to improve international aviation security should be handled, as has hitherto been the case, by multilateral negotiations especially since US procedures may not be the most effective in a non-US environment.

Aircraft Repair Stations

The FAA reauthorisation bill (AIR-21) of April 2000 directs the Administrator to establish an aircraft repair and maintenance advisory panel. It also directs the Secretary of Transportation to request information from foreign air carriers in order to assess balance of trade issues. The EU remains concerned that a conflict could develop with the GATS-specific commitments undertaken by the US regarding aircraft repair and maintenance services.

Fly America Act

Section 1117 of the Federal Aviation Act requires that, in general, transportation funded by the US Government (passengers and cargo; mail is covered by separate legislation) must be performed by US carriers. In the EU any obligation for government officials to use “national flag” is considered to be anti-competitive and contrary to the Treaty.

Leasing

The US and EU rules on dry leasing are broadly similar in effect. However, Article 8(3) of Council Regulation (EEC) No 2407/92 limits leases of foreign registered aircraft by EU carriers to a short term to meet their temporary needs; or otherwise if there are exceptional circumstances. Many EU carriers lease equipment (both with and without flight crew) from US carriers and leasing companies.

The US rules on wet lease prevent any lease of non-US registered aircraft by US carriers. No Community registered aircraft with Community flight crew can thus be leased to US companies. The US authorities subject applications for wet leases by EU carriers of third country aircraft for use on routes to the US to a "public interest" test.

Maritime Transport Services

WTO negotiations on international maritime transport were suspended on 28 June 1996. Resumption is scheduled at the same time as the new round of negotiations on the liberalisation of services by the year 2000. In the meantime, WTO Members agreed to observe a standstill clause. The EU regretted that, during the negotiations, the US never tabled an offer relating to maritime transport services and firmly hopes that the US will endeavour to achieve a multilateral agreement in order to create a better environment for shippers and ship-operators. The EU maintains that the most effective means to achieve the widest possible liberalisation of the sector is through the WTO.

International maritime transport markets in the US are predominantly open. However, significant restrictions remain on the use of foreign built vessels in the US coastwise trade and in relation to access to certain international cargoes from which non-US vessels are excluded.

Coastwise trade

In particular, foreign-built (or rebuilt) vessels are prohibited from engaging in coastwise trade either directly between two points of the US or via a foreign port. Trade with US island territories and possessions are included in the definition of coastwise trade (Merchant Marine Act of 1920 - the Jones Act). Moreover, the definition of vessels has been interpreted by the US Administration to cover hovercraft and inflatable rafts. These limitations on rebuilding act as another discrimination against foreign materials: the rebuilding of a vessel of over 500 gross tonnes (gt) must be carried out within the US if it is to engage in coastwise trade. A smaller vessel (under 500 gt) may lose its existing coastwise rights if the rebuilding abroad or in the US with foreign materials is extensive (46 USC 83, amendments of 1956 and 1960).

In the context of the negotiations for the OECD Shipbuilding Agreement, it was agreed that the Jones Act would be subject to a special review and monitoring procedures.

In addition, no foreign-built vessels can be documented and registered for dredging, towing or salvaging in the US. Third countries are thus not able to have access to the US market at a time when part of the ageing US fleet needs to be renewed and many US ports are in need of dredging.

Cargo preferences measures

The US have a number of statutes in place which require certain types of government-owned or financed cargoes to be carried on US-flag commercial vessels. The impact of these cargo preference measures is very significant. They deny EU and other non-US competitors access to a very sizeable pool of US cargo, while providing US ship owners with guaranteed cargoes at protected, highly remunerative rates.

The application of the measures to US public procurement contracts introduces uncertainty for those businesses whose tenders include shipping goods to the US. Whether they are required to ship the goods on US-flagged vessels, which charge significantly higher freight rates than other vessels, is not known until after the award of the contract.

The relevant legislative provisions are:

- The Cargo Preference Act of 1904 requires that all items procured for or owned by the military departments be carried exclusively on US-flag vessels.

- Public Resolution N°17, enacted in 1934, requires that 100% of any cargoes generated by US Government loans (i.e. commodities financed by Export-Import Bank loans) be shipped on US-flag vessels, although MARAD may grant waivers permitting up to 50% of the cargo to be shipped on vessels of the trading partner.

- The Cargo Preference Act of 1954 requires that at least 50% of all US government-generated cargoes subject to law be carried on privately-owned US flag commercial vessels if they are available at fair and reasonable rates.

- The Food Security Act of 1985 increases to 75% the minimum proportion of agricultural cargoes under certain foreign assistance programs to be shipped on US-flag vessels.

LIST OF FREQUENTLY USED ABBREVIATIONS

ASCM	Agreement on Subsidies and Countervailing Measures
DoC	Department of Commerce
DoD	Department of Defense
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FDA	Food and Drug Administration
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
MFN	Most-favoured nation
NASA	National Aeronautics and Space Administration
NTA	New Transatlantic Agenda
OECD	Organisation for Economic Co-operation and Development
TBT	Technical Barriers to Trade
TRIPs	Trade Related Aspects of Intellectual Property Rights
USDA	US Department of Agriculture
USTR	United States Trade Representative
WTO	World Trade Organisation